Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 731

W. D. HARRIGAN, DORINE HARRIGAN, VIRGINIA H. O'MELIA and T. H. O'MELIA,
Petitioners,

v.

PHILLIP I. HAMM, as Commissioner of Revenue of the State of Alabama,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

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v.

PHILLIP I. HAMM, as Commissioner of Revenue of the State of Alabama,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.[1]

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered in the above entitled consolidated cases on September 9, 1965.

[1] Since these cases were consolidated below and since the questions in both remain identical, a single petition for certiorari is being filed in behalf of petitioners in both consolidated cases. See, Stern and Gressman, **Supreme Court Practice**, Third Edition, Section 6-37, p. 243, and Rule 23(5) of the Rules of this Court.

Page references to the Harrigan record below are preceded by H, and to the O'Melia record by O.

OPINIONS BELOW.

The opinion of the Supreme Court of Alabama (Appendix B, *infra,* pp. 29-47) is unreported. The opinion of the Circuit Court of Montgomery County granting the peremptory writs of mandamus sought by petitioners—the judgment reversed by the Supreme Court of Alabama (Appendix B, *infra,* pp. 50-55)—is unreported.

JURISDICTION.

The judgment of the Supreme Court of Alabama (Appendix B, infra, pp. 29-47) was entered on September 9, 1965. While petitioners did not apply for rehearing, their later petition of October 13, 1965 (R. H. 97, O. 94), was stricken on October 21, 1965 (Appendix B, infra, pp. 48-49). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED.

1. Whether, consistently with the guarantee of equal protection of the laws in the Fourteenth Amendment of the Constitution of the United States, state taxing authorities may impose on a taxpayer state income taxes on transactions held exempt as to other taxpayers similarly situated, and thereby subject such taxpayer to state taxes not imposed on others of the same class?

2. Whether, when the highest court of a state has departed from its earlier decisions to hold that a state taxpayer has not chosen the appropriate means to seek refund of taxes, conceded not to be due and hence wrongfully and illegally withheld in violation of federal rights, that court has denied that taxpayer due process of law as guaranteed by the Fourteenth Amendment of the Con-

stitution of the United States by depriving him of an opportunity to be heard and to assert his substantive rights?

3. Whether unforeseeable, unsupported, insubstantial, novel and unique state procedural requirements fixed for the first time by a state court decision contrary to earlier decisions of the same state court may preclude and thwart consideration in this Court of asserted federally protected rights?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional and statutory provisions involved are Amendment Fourteen of the Constitution of the United States; and Title 51, Sections 140, 388, 407, 410, 414, 53 and 913 of the Alabama Code. They are printed in Appendix A, *infra*, pp. 19-28.

STATEMENT.

The judgment of the Supreme Court of Alabama set aside a writ of mandamus issued by the Circuit Court of Montgomery County which had ordered the Commissioner of Revenue of Alabama to refund to petitioners Harrigan $159,744.45 and to petitioners O'Melia $216,470.25 of Alabama income taxes paid on 1959 assessments. The Circuit Court ordered the refund because on October 18, 1962, the Supreme Court of Alabama, in **Buchanan v. State**, 274 Ala. 592, 150 So. 2d 200 (Appendix C, *infra*, pp. 56-62) had held, in circumstances admitted to be precisely similar, that the transactions which underlay the assessments were exempt by Title 51, Section 388;[2] and because the failure of the Commissioner to grant petitioners' timely

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[2] All statutory references are to the Alabama Code of 1940, as last amended, except as otherwise indicated.

application for refund under Title 51, Section 410, was conceded, therefore, to be an illegal retention of tax monies not due, and was clearly an unequal treatment of these petitioners.[3] Moreover, the Circuit Court noted, as had the Supreme Court of Alabama, that **Buchanan** was a case of first impression.

Because petitioners had not appealed within thirty days of December 30, 1959, pursuant to Title 51, Section 140 (though without question the petition for refund under Title 51, Section 410 was in proper form and within the three years specified by that section), the Supreme Court of Alabama reversed the Circuit Court's judgment of mandamus. Its opinion conceded that the underlying transactions upon which petitioners were assessed on December 30, 1959, had been held later to be exempt from Alabama income taxation in **Buchanan v. State**, 274 Ala. 592, 150 So. 2d 200. The issue for the court below was:

> "The question for decision is, does Section 410 apply when an assessment has been made final under Section 407 and no appeal has been taken under Section 140" (R. H. 75, O. 72, Appendix B, *infra*, p. 33).

The court below held that the commissioner, and hence the State of Alabama, had not denied these petitioners equal protection of the laws and had not treated them in an invidious and discriminatory fashion because "the difference is, that in **Buchanan**, the taxpayer took an appeal under Section 140, Title 51, and the instant taxpayer, for good and sufficient reasons which are known

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[3] In their petitions for mandamus below (R. 1), petitioners had urged the Federal constitutional grounds, among others, that the "illegal retention of these tax monies by the State of Alabama denies to petitioners due process of law as afforded by the Fourteenth Amendment of the Constitution of the United States * * * and also denies to petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States."

to him but not to this Court, chose not to appeal under Section 140" (R. H. 94, O. 91, Appendix B, *infra*, p. 46).[4]

All of the facts of this case are literally without dispute. These petitioning taxpayers paid to the State of Alabama income taxes for the calendar year 1958 of $159,744.45 and $216,470.25, respectively. The Alabama taxing authorities had assessed these taxes on a portion of liquidating dividends received by petitioners from a domestic corporation. These liquidating dividends were paid in kind in assets acquired by the domestic corporation solely from its earnings and income on which the corporation had properly reported and paid all of its income taxes due to the State of Alabama for each year during its entire existence. All of the assets of this corporation, other than its original capital, were acquired from these earnings and income on which all income taxes due the State of Alabama had been paid.

The respondent Commissioner had taken the position, nevertheless, that unrealized appreciation in the value of certain assets of this domestic corporation, when distributed as liquidating dividends to the stockholders, was income to them and was not exempt under Title 51,

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[4] It will be shown subsequently in this petition that the Supreme Court of Alabama had never before held that a requirement of statutory appeal under Title 51, Section 140 is a prerequisite to a petition for refund of Alabama income taxes erroneously and illegally paid through mistake or error pursuant to Title 51, Section 410; and that the holding at bar is contrary to earlier decisions of that court and has taken from these petitioners the opportunity to be heard and to promulgate their constitutional rights to equal and non-discriminatory tax treatment in relation to other taxpayers similarly situated. **Graves v. McDonough**, 264 Ala. 407, 88 So.2d 371; **State v. First National Bank of Auburn**, 273 Ala. 379, 141 So.2d 196; **State v. Brown**, 254 Ala. 215, 48 So.2d 36; **Bashinsky v. Sparks**, 274 Ala. 166, 146 So.2d 303 (Records of the Supreme Court of Alabama, Volume No. 5174, Appendix D, infra, pp. 63-78); and **State v. Woodroof**, 253 Ala. 620, 46 So.2d 553.

Section 388.[5] Assessments were entered against these petitioners in the above amounts and for the foregoing reasons on December 30, 1959.

Thereafter, as observed, the Supreme Court of Alabama for the first time construed and interpreted Title 51, Section 388, in the case of **Buchanan v. State**, 274 Ala. 592, 150 So.2d 200. This supervening decision held, on facts admitted to be precisely similar, that a liquidating dividend such as that received by petitioners, was exempt from Alabama income taxation under Title 51, Section 388. The **Buchanan** decision held that the imposition of tax had been erroneous and illegal.

After the respondent commissioner had denied their timely applications for refund under Title 51, Section 410—a statute which permits Alabama income taxpayers to obtain a refund of those taxes which "through mistake or error" they have paid "when not legally due"—petitioners sought mandamus in the Circuit Court as the statute specified. The respondent commissioner, as the Circuit Court observed, has conceded through his responsive pleadings to the mandamus petition below, and by statement of his counsel in open court, that there is no substantive difference on the merits between the tax situation of these petitioners and the taxpayer in the **Buchanan** case. Respondent, and the court below, take the sole ground that the failure of these petitioners to appeal within thirty days of December 30, 1959, as permitted by Title 51, Section 140, barred them from seeking a timely refund under Title 51, Sections 410 and 414 of more than $375,000.00 of income taxes, admitted to be

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[5] Section 388 exempts from Alabama income tax "dividends received on stocks of domestic corporations, including liquidating dividends paid from income of domestic corporations on which the corporation distributing such dividends has paid all income taxes due the State of Alabama in the current or prior tax years."

within the ambit of **Buchanan**, and thus obviously withheld wrongfully and illegally.

In sum, the Alabama Department of Revenue asserted in 1959 that certain portions of liquidating dividends paid to these petitioning taxpayers were not exempt by Title 51, Section 388, and entered an assessment accordingly. Petitioners paid the assessments under the "mistake or error" that they were "legally due" (Title 51, Section 410). Subsequently, within the three year period of limitations, the Supreme Court of Alabama held in 1962 that the commissioner had been wrong in his interpretation that these transactions were taxable and that they were in fact exempt as payment of liquidating dividends under Title 51, Section 388. Notwithstanding, the Supreme Court of Alabama has now held that the State may retain these taxes illegally collected, despite the intentionally disparate treatment of these petitioners in relation to other Alabama income taxpayers admitted to be similarly situated.

REASONS FOR GRANTING THE WRIT.

I.

The Supreme Court of Alabama has decided a federal question in a way which conflicts with a long line of applicable decisions of this Court that the equal protection clause of the Fourteenth Amendment "protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." **Hillsborough Township v. Cromwell**, 326 U.S. 620, 623. This Court there held, as it had in numerous cases before and has since, that "the right is the right to equal treatment."[6] This

[6] See also **Sioux City Bridge Co. v. Dakota County**, 260 U.S. 441; **Iowa-Des Moines National Bank v. Bennett**, 284 U.S. 239; **Cumberland Coal Co. v. Board of Revision**, 284 U.S. 23; **Wheeling Steel Corp. v. Glander**, 337 U.S. 562, 572. Compare **Nashville, C. & St. L. Ry. v. Browning**, 310 U.S. 362.

Court, moreover, has granted certiorari where petitioners "have properly attacked the validity of [state] assessments [in state courts] under the equal protection clause of the Fourteenth Amendment . . ." **Charleston Federal Savings and Loan Association v. Alderson**, 324 U.S. 182, 187.

As will be noted subsequently, the Supreme Court of Alabama not only invoked a novel procedural requirement to deny petitioners the opportunity to assert and safeguard their substantive constitutional rights in the Alabama courts. It departed from its own decisions to reach this impermissible result. And this Court has often held—indeed, it has told the Supreme Court of Alabama—that "novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." **NAACP v. Alabama**, 357 U.S. 449, 457-458. And see **Brinkerhoff-Faris Trust and Savings Co. v. Hill**, 281 U.S. 673, 678.

It is difficult to conceive of more devastating discrimination than the State of Alabama, through its Commissioner of Revenue, and subsequently through its highest court, has leveled at these petitioners. They paid more than $375,000.00 in income taxes asserted to be due by the state taxing authorities. When the Supreme Court of Alabama in **Buchanan v. State**, 274 Ala. 592, 150 So.2d 200 held that the identical transaction upon which these petitioners were so taxed was in fact exempt, the taxing authority, nevertheless, refused to honor timely application for a statutory refund of taxes thus illegally assessed and collected under mistake of fact or law. Though the Alabama court of first instance ordered a refund of these taxes so that the state would treat these petitioners equally in relation to all other Alabama income taxpayers similarly situated, the Supreme Court of Alabama, upholding

the respondent Commissioner, also singled out these petitioners alone for this arbitrary tax treatment. Its decision squarely violates **Hillsborough Township v. Cromwell**, 326 U.S. 620, 623, and the cases already cited (n. 6, *supra*).

The decision below violates in addition the stringent requirements of equal tax treatment which that Court has heretofore espoused. **State v. Alabama Power Company**, 254 Ala. 327, 48 So.2d 445.[7]

The discriminatory state action taken by the Court and taxing authority below produces an invidious result which this Court long ago held to be a violation of the Fourteenth Amendment's requirement of equal treatment. **Yick Wo v. Hopkins**, 118 U.S. 356, 373-374:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The state action below, moreover, having cast aside statutory refund procedures well established in Alabama and elsewhere—procedures precisely designed to prevent such arbitrary treatment—accomplishes more than a deprivation of petitioners' constitutional rights. The illegal retention of petitioners' tax monies "is immoral and amounts in law to a fraud on the taxpayer's rights." **Bull v. United States**, 295 U. S. 247, 261.

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[7] Indeed, the Supreme Court of Alabama has specifically recognized that the Alabama Constitution imposes a more "narrow" and "cramping" requirement of equality in tax treatment than even the 14th Amendment of the Constitution of the United States. **State v. Alabama Power Company**, 254 Ala. 327, 336, 48 So.2d 445.

II.

The court below departed from its earlier decisions to hold that petitioners could not assert their statutory and constitutional rights because they had not appealed from the state income tax assessment. That court thus "denied [petitioners] due process of law—using that term in its primary sense of an opportunity to be heard and to defend [their] substantive right." **Brinkerhoff-Faris Trust and Savings Company v. Hill**, 281 U.S. 673, 678. There, as here, a state taxpayer asserted invasion "of [a] substantive right under the Federal Constitution to equality of treatment" (Ibid.).[8]

This Court recently held in **Bouie v. Columbia**, 378 U.S. 347, 354, that "an unforeseeable and unsupported state court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a Federal question (citations)." This Court, moreover, has "often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review (citations)." **Barr v. Columbia**, 378 U.S. 146, 149-150. And this Court has indeed told the Supreme Court of Alabama that "the consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." **NAACP v. Alabama**, 377 U.S. 288, 297. And see this Court's earlier admonition to the court below in **NAACP v. Alabama**, 357 U.S. 449, 457-458.

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[8] A Missouri taxpayer had sought to challenge a state taxing statute as a violation of the equal protection clause by bill in equity in the state court to restrain collection of the tax. The Missouri Supreme Court overruled a prior decision that relief from a tax assessment could not be obtained from the state tax commission, and this time held that the taxpayer should have brought its complaint before the commission, and that it was not entitled to equitable relief because of its failure to do so.

This Court will find that Alabama statutory and decisional law have never required that an income taxpayer must appeal from a final assessment under Title 51, Section 140, in order to petition for refund under statutes which afford restitution "whether or not the tax shall have been paid under duress or protest" (Title 51, Section 410) and which provide for the recovery of taxes "erroneously or illegally **assessed** or collected . . . whether or not such penalty or sum has been paid under protest or duress" (Title 51, Section 414, emphasis supplied). On the contrary, in several cases the Supreme Court of Alabama has permitted a petition for refund where there had been an earlier failure to pursue a statutory appeal. The decision below was not only unforeseeable, unsupported, and novel; it was a stark departure from these earlier holdings. As a result, petitioners have been denied an opportunity to assert their constitutional rights to equal and non-discriminatory tax treatment in relation to other Alabama income taxpayers similarly situated. This Court has never permitted such a bar to a claim of federal rights.

Graves v. McDonough, 264 Ala. 407, 88 So.2d 371, squarely conflicts with the holding below. Indeed, payment of taxes in that case was substantively erroneous on the basis of a **prior decision.** In the case at bar, it was not until the decision in **Buchanan v. State**, 274 Ala. 592, 150 So.2d 200, almost three years later, that petitioners learned that they had paid on a tax exempt transaction. Even so, the Court in **Graves v. McDonough**, 264 Ala. 407, 88 So.2d 371, though no appeal had been taken pursuant to Title 51, Section 53, permitted a suit for refund because the State had attempted to impose an ad valorem tax on property which was exempt from the scope of the taxing statutes. The Court held:

> "[T]he taxpayer by failing to object [by appeal] was not cut off from other remedies which he may have had to contend that the assessment was void

> for want of legal authority, and to obtain a refund. * * * Being void (sic), the taxpayer was not required to pursue any certain remedy to get it so declared and obtain a refund" (264 Ala. at 409).

The court below attempts to distinguish **Graves v. McDonough,** but its own quotation from that decision (p. 13) belies the attempted distinction. For the very quotation from the case approves a refund procedure after failure to appeal as an exception " 'made when the attempted assessment is a nullity because the property is either **tax exempt** or outside the jurisdiction' " (264 Ala. at 409, emphasis supplied).

The case at bar involves a tax exemption; **Buchanan** involved the same tax exemption and the same transactions; **Graves v. McDonough,** in terms and as characterized in the decision below, involved a tax exemption. The court below, holding that the statutory refund procedure is not available to petitioners, has simply overruled **Graves v. McDonough.**

The court below also did not follow **State v. First National Bank of Auburn,** 273 Ala. 379, 141 So.2d 196. That case described the very refund statute here involved (Title 51, Section 410) in circumstances where there had been no appeal under Title 51, Section 140:

> "It seems clear to us that the last sentence of the portion of the Act set out above discloses a legislative intent to authorize relief to the taxpayer by way of refund. And that is the way appellee first attempted to get relief. Its application for refund, filed on December 8, 1955, and rejected on January 6, 1958, was well within the three years allowed for applying for a refund. See: Code 1940, Tit. 51, § 410, . . ." (273 Ala. at 382).[9]

[9] The tax involved was an excise tax on financial institutions, Title 51, Sections 425, et seq., which is imposed on national banks in lieu of an income tax.

The court below, completely ignoring this language, has attempted to distinguish this case by observing that the tax benefit had come after the time for statutory appeal had passed. But **Buchanan v. State**, 274 Ala. 592, 150 So.2d 200—characterized as a case of first impression—construed a statute as conferring a tax exemption on these petitioners after their thirty day period for appeal had also passed. The attempted distinction between a tax benefit conferred by legislation, on the one hand, and by a supervening decision of a state's highest court construing for the first time a state tax exemption statute, on the other, is wholly spurious.

The court below was also confronted with its earlier decision in **State v. Brown**, 254 Ala. 215, 218, 48 So.2d 36, which held:

> "The very purpose of § 410, Title 51, Code of 1940 is to permit of a correction of the amount of the tax where the tax has been erroneously paid. State v. Woodroof, 253 Ala. 620, 46 So.2d 553, 562. We do not think that the good purposes of this statute should be thwarted in this case because it was determined subsequent to 1942 that amounts paid to the taxpayer in 1942 were excessive and subject to refund. If this were true the statute would be emasculated."

Though the court below attempts to distinguish **Brown** as being a Title 51, Section 140 appeal in a case where a final assessment was made after a petition for refund, it ignores the fact that this earlier decision treated the two procedures as correlative ones and clearly did not impose the appeal procedure as a prerequisite to the refund procedure.

The Court below also sought to distinguish its earlier decision in **State v. Woodroof**, 253 Ala. 620, 631, 46 So.2d 553, where it had held that "any payment of (income tax)

was subject to a refund within two years[10] if erroneous, Section 410, Title 51", on the ground that the case discussed payment on the basis of a return and not on the basis of an assessment. But the Income Tax Regulations of the State of Alabama, Reg. 407.1, provide that where the Department of Revenue finds no error in the return "it shall be entered on the tax rolls, thereby making final assessment against the taxpayer in the amount shown by the return . . ." Moreover, this same regulation specifies that "the taxpayer will receive no notification of this action unless he has failed to pay the tax as shown to be due by the return." The **Woodroof** language applied to departmental procedure means precisely that there can be a petition for refund within the period of limitations even though there has been no appeal under Section 140.

Perhaps most striking of all, the court below has overruled *sub silentio* the case of **Bashinsky v. Sparks**, 274 Ala. 166, 146 So.2d 303. The reported decision upheld that taxpayer's right to refund on application under Title 51, Section 410, and noted that "all necessary administrative and procedural steps were taken by the petitioners". (274 Ala. at 168). The reported decision does not reveal whether there had been a prior final assessment of income taxes without an appeal under Title 51, Section 140.

But the record in **Bashinsky**, bound as Volume No. 5174 of the records of the Supreme Court of Alabama,[11] shows that the procedural steps there taken were exactly those of petitioners at bar. That record shows a final assessment of income taxes against that taxpayer on September 17, 1957; a payment of the taxes so assessed on September 30, 1957; no appeal under Title 51, Section 140;

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[10] Section 410 was subsequently amended to provide a limitations period of three years instead of two.

[11] A copy of pertinent portions of this record, properly certified is set out in Appendix D, *infra*, pp. 63-80.

and a petition for refund filed with the department on June 15, 1960.[12]

The findings and opinion of the Circuit Court in **Bashinsky** characterized the petition for mandamus as one which "seeks the nullification of the final assessment of the State Department of Revenue for income tax for the calendar year 1956, which assessment was entered on September 17, 1957 in the amount of $5,778.66. This sum was paid on September 30, 1957" (Appendix D, *infra*, p. 76).

This judgment, denying mandamus and ratifying the assessments, was reversed by the Supreme Court of Alabama on appeal and remanded with directions that "the writ in the nature of mandamus should issue to the commissioner" (274 Ala. at 171).

Accordingly, the decision below, holding that these petitioners were not entitled to a refund under the Title 51, Section 410 procedure because they had not appealed under Title 51, Section 140, is directly contrary to that court's prior holdings. The court below has thus denied these Alabama income taxpayers tax exemptions accorded other taxpayers similarly situated under its own interpretation of the relevant exemption statutes construed in **Buchanan v. State**, 274 Ala. 592, 150 So.2d 200;[13] and petitioners have been denied also the identical procedural route to assert and safeguard their constitutional rights which the Court below found appropriate and lawful in its earlier cases.

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[12] These facts, set out in the petition for mandamus, are admitted in the commissioner's answer; and that answer states that that commissioner "does not wish to challenge the petitioners' right to bring this action . . ." (Appendix D, *infra*, pp. 73-74).

[13] Petitioners assume that the court below accords continued efficacy to the **Buchanan** case and that it does not bring that adjudication "into the same class as a restrictive railroad ticket, good for this day and train only." **Smith v. Allwright**, 321 U.S. 649, 669 (dissenting opinion of Mr. Justice Roberts).

There is simply no support—fair or substantial or otherwise—for the procedural block which the Court below has used to attempt to thwart these petitioners in the proper assertion of their unquestioned federal constitutional rights. The attempt below denies these petitioners due process of law and the equal protection of the laws, and conflicts with the many decisions of this Court cited above. This Court should not permit the shocking retention of more than $375,000.00 of tax monies admitted not to be due the State of Alabama. And the Supreme Court of Alabama should not be permitted to destroy, by departing from its own prior decisions, petitioners' effective opportunity to present their claim of federal right.

III.

The court below had to depart from its own decisions in order to single out these petitioners alone for the payment of income tax on transactions which it had earlier held tax exempt. This invidious discrimination has cost these petitioners more than $375,000.00. Even if the court below had followed its own prior decisions to reach a result so offensive to every concept of elemental fairness, its decision would nevertheless have conflicted with the salutary results which this Court has reached when it has been apparent "that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules." **United States v. Ohio Power Co.**, 353 U.S. 98, 99. This Court applied this doctrine as recently as October 18, 1965 in **Gondeck v. Pan American World Airways, Inc.**, 34 U. S. Law Week 3129, in the following circumstances:

> "On June 11, 1962, we denied certiorari. 370 U.S. 918. On October 8, 1962, we denied a petition for rehearing. 371 U.S. 856. We are now apprised, however, of 'intervening circumstances of substantial . . .

effect,' justifying application of the established doctrine that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.' United States v. Ohio Power Co., 353 U.S. 98, 99. Subsequent to our orders in the present case, the Court of Appeals for the Fourth Circuit upheld an award to the survivors of another employee killed in the same accident. Pan American World Airways, Inc. v. O'Hearne, 335 F.2d 70. In upholding the award, the court cited our decision in O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504. In a subsequent case the Court of Appeals for the Fifth Circuit itself expressed doubt whether its decision in the present case had been consistent with Brown-Pacific-Maxon. O'Keefe v. Pan American World Airways, 338 F.2d 319, 325. The court also noted that, 'The Gondeck case stands alone, except for a per curiam opinion.' Id., at 325. This Court reversed that per curiam judgment last Term. O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, so that the present case now stands completely alone.

* * * * * * * *

"Since the Court of Appeals for the Fifth Circuit misinterpreted the Brown-Pacific-Maxon standard in this case, and since, of those eligible for compensation from the accident, this petitioner stands alone in not receiving it, 'the interests of justice would make unfair the strict application of our rules.' United States v. Ohio Power Co., supra, at 99.

"We therefore grant the motion for leave to file the petition for rehearing, grant the petition for rehearing, vacate the order denying certiorari, grant the petition for certiorari, and reverse the judgment of the Court of Appeals."

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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.....

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APPENDIX A.

Constitutional and Statutory Provisions Involved.

Constitution of the United States.

Amendment 14.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Code of 1940, Title 51.

§ 140. **Appeal from final assessment made by department.**—Either the state or the taxpayer may appeal from any final assessment made by the department of revenue under any assessment required by law to be made by the department of revenue. If the appeal is by the state such appeal shall be made by the attorney general filing the written notice with the secretary of the department of revenue, and with the register of the circuit court of Montgomery County in equity, within thirty days after such assessment is made final. The department of revenue shall immediately give notice by registered mail to the taxpayer of the filing of such appeal by the state. If any taxpayer against whom an assessment is made by the department of revenue under any assessment required by law to be made by the department of revenue, is dissatisfied with the final assessment as fixed by the said department of

revenue, he may appeal from said final assessment to the circuit court of Montgomery County sitting in equity, or, in cases other than public utilities, to the circuit court of the county in which the taxpayer resides if the taxpayer has within the state a permanent residence, at the option of the taxpayer, by filing notice of appeal with the secretary of the department of revenue and with the register of the circuit court of the county to which the appeal shall be taken within thirty days from the date of said final assessment made and entered on the minutes of the department as required by law, and in addition thereto by giving bond conditioned to pay all costs to be filed with and approved by the register of the court to which the appeal shall be taken. The taxpayer shall pay the assessment so made before the same shall become delinquent and if such taxes are not paid before the same becomes delinquent, the court shall upon motion *ex mero motu* dismiss such appeal, unless at the time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the register of the court to which the appeal shall be taken in double the amount of the taxes payable to the state of Alabama, conditioned to pay all taxes, interest, and costs due the state, county or any agency or subdivision thereof. In such appeals the party taking the appeal shall be styled the appellant and the party against whom the appeal is taken shall be styled the appellee. The assessment made by the department of revenue shall prima facie be correct, and where the appeal is taken by the taxpayer the burden shall be on the appellant to show that such assessment is incorrect. The circuit court in equity, or the supreme court of Alabama on appeal to it may, if it be of the opinion from all the evidence that the assessment as made is either too high or too low, fix the amount of such assessment. The court shall hear such appeals according to its own rules and methods or procedure so far as practicable and shall decide all ques-

tions both as to the legality of the assessment and the amount thereof. No court shall have the power to enjoin the collection of any taxes due on such assessment so appealed or to suspend the payment thereof. From the judgment of the circuit court in equity, either the state or the taxpayer may appeal direct to the supreme court of Alabama, within thirty days from the rendition of the judgment; the taxpayer shall give security for the cost of such appeal to be approved by the register of the circuit court from which the appeal shall be taken. If upon such appeal the assessment made by the department of revenue is reduced, the court upon proof of payment of said tax shall ascertain and recite such fact in the judgment and shall ascertain and determine by its judgment or decree, the amount of tax which was invalid or which was excessive both as to the amount paid to the state, counties, county boards of education, municipalities or other governmental agencies receiving any part of such taxes, and upon presentation of a certified copy of the judgment to the comptroller, it shall be the duty of the comptroller to draw his warrant on the treasurer in favor of such taxpayer for such an amount as the judgment of the court shall ascertain and declare has been erroneously paid to the state, together with interest from date of payment, and such warrant of the comptroller shall be paid out of any funds in the treasury as a current obligation of the year in which said refund is ordered. Upon presentation of a certified copy of such judgment to the court of county commissioners or other governing body of any county, or upon presentation of a certified copy of such judgment to a county board of education, or to the city council or other governing body of any municipality, or upon presentation of a certified copy to the governing body of any other agency of the state which may have received any part of said tax erroneously paid as determined by the judgment, it shall be the duty of said court of county commissioners

or other governmental body of the county, or the county board of education or the city council or other governmental body of a municipality, or of the governmental body of any other agency receiving any part of such taxes to draw its warrant on the treasurer of such county, school board, municipality, or other agency in favor of the taxpayer for such amount of said tax as may have been erroneously paid to such county, school board, municipality or other agency, together with interest from date of payment. Such amounts shall constitute claims preferred over all other claims and the respective treasurers are hereby required to refund such amounts received by said county, school board, municipality or other agency. In the event the judgment of the court shall fix an assessment greater than that appealed from when the taxpayer has paid the taxes on the assessment appealed from, the court shall fix and determine the amount of such excess and the taxpayer and the sureties on his appeal bond shall be adjudged to pay the taxes due by reason of such increased assessment with interest from date of judgment and the lien and priorities of the state and counties shall apply to such additional amount as in other cases. The court in fixing the assessment shall order the assessing authorities to apportion the same and the collecting authorities to collect taxes thereon for the several taxing subdivisions in the manner provided by law. Where the taxpayer elects to make supersedeas bond, and not to pay the taxes, the court, in rendering final judgment shall order that interest at the legal rate shall be paid on such assessment as finally made from the date that such taxes would have become delinquent on the original assessment. (Ib.; 1936, Ex. Sess., p. 172.)

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§ 388. **Exemptions.**—The following exemptions from income taxation shall be allowed to every individual resident taxpayer. * * * Dividends received on stocks of domestic

corporations, including liquidating dividends paid from income of domestic corporations on which the corporation distributing such dividends has paid all income taxes due the state of Alabama in the current or prior tax years. • • •

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§ 407 **Assessment of income taxes.**—The income tax provided for in this chapter shall be assessed and fixed as hereinafter provided by the department of revenue and upon blanks in the form to be prescribed by the department of revenue. Provided, the amount shown to be due by the taxpayer's return shall constitute and create a prima facie liability for such amount on which taxes shall be paid as herein provided. Provided, further, that "assessment" or "assessed" herein used shall refer to and mean the final determination of the amount found to be due by the department of revenue. Provided, further, that the mailing of the income tax blank to persons liable for the tax herein provided, shall be the only notice required to be given, except where the amount as finally fixed by the department of revenue shall be different from the amount shown to be due by the returns as made by the taxpayer. Provided, further, that the failure to receive such blank shall not relieve any person required to make a return, from making such return, or the penalties for failure to so do or liability for tax. Provided, further, that where the department of revenue determines that the amount due is different from that shown by the taxpayer's return, notice of such different amount shall be given to taxpayer by registered mail, return receipt requested, giving the taxpayer notice of the amount so fixed and the department of revenue shall fix a day, not less than fifteen days from date of such notice, for hearing any protest of taxpayer. The time and place of such hearing shall be designated in such notice. Upon hearing such protest or if the taxpayer fails to appear on the day

set, the department of revenue shall finally fix, determine and assess the amount of tax due and notify the taxpayer thereof by registered mail. Within thirty days from the date of mailing the letter advising the taxpayer of such assessment the taxpayer may appeal from such assessments in the same manner as in cases of appeals from assessments made by the department of revenue as provided in this title. (Ib.)

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§ 410. **Tax paid through mistake or error.**—In case any taxpayer has through mistake or error paid an income tax which he is not legally due, or has paid an amount in excess of which he was in fact due, such taxpayer may make application on forms furnished therefor, to the department of revenue to have such amount erroneously paid refunded, and upon making satisfactory proof to the department of revenue that such error was made, the department of revenue shall certify to the comptroller the amount to be refunded by the state and warrant shall be drawn for such refund together with interest at the legal rate. Applications for refund shall be made within three years from date of payment. In the event the department of revenue fails or refuses to certify to the comptroller the amount of tax due to be refunded or if he certifies a lesser amount than the taxpayer deems he is entitled to have refunded, the taxpayer may institute a proceeding in the circuit court of Montgomery county in the nature of a mandamus proceeding to require the department of revenue to certify, to the comptroller, the amount due to be refunded to such taxpayer. The taxpayer shall have the right to institute and prosecute such proceedings in the nature of mandamus whether or not the tax shall have been paid under duress or protest and without regard to the fact that the department of revenue may be entitled to exercise in respect of the determination of the amount to be refunded some

measure of discretion and the court shall be entitled to determine whether or not and to what extent any discretion committed to the department of revenue shall have been properly exercised (Ib.; 1951, p. 1457, § 1, effective Jan. 1, 1951).

* * * * * * * *

§ 414. **Limitation upon suits and proceedings by the taxpayer.**—No suit or proceeding shall be maintained in any court for the recovery of any tax collected under the authority of this chapter alleged to have been erroneously or illegally assessed or collected or of any penalty claimed to have been collected without authority or of any sum alto have been excessively or in any manner erroneously collected (except as is otherwise provided in section 407 of this title) until the claim for refund or credit has been duly filed with the department of revenue according to the provisions of law in that regard and regulations established in pursuance thereof but such suit or proceeding may be maintained whether or not such tax, penalty or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of three months from the date of filing such claim unless the department of revenue renders a decision thereon within that time, nor after the expiration of five years from the date of payment of such tax, penalty or sum, in any event. Provided, however, that in the event the department of revenue disallows said claim, or any part thereof, and notifies the taxpayer of such disallowance by registered mail, then the taxpayer must within a period of two years from the date of such notification, commence his suit or proceeding. Provided, however, that this section shall not prejudice or impair the right of the taxpayer to a credit against taxes imposed by this chapter for the amount of any refund allowed in accordance with the provisions of section 410 of this title, nor for the amount of any judgment recov-

ered in accordance with section 407 of this title, even though at the time such credit is claimed the right of any such taxpayer to file suit would be barred hereunder. (Ib.)

* * * * * * *

§ 53. **Assessment of escaped taxes; appeal.**—Whenever the tax assessor shall discover that any property, including any improvements on real estate assessed as vacant property, has escaped taxation in any assessment within five years next preceding the current year, he shall list, return and value said property for assessment for the years during which same has escaped taxation, and shall also endorse on such returns the year or years for which the property has escaped taxation, and the accrual of a penalty of ten percent of the taxes assessed thereon for each year. The tax assessor shall give notice of such escape assessment by registered mail, return receipt demanded, to the owner or to the agent or attorney of such owner, notifying such person to appear before the assessor in person, or by agent or attorney, within twenty days after such notice is given, if there be an objection to the assessment and notifying such person that if no objection is made said assessment will be made final on the twentieth day after the mailing of such notice of escape assessment. If on the date set for hearing such objection the person against whom the assessment is made fails to appear, or, if in the opinion of the tax assessor the assessment should not be changed and the assessment is proper, then the tax assessor shall make the assessment final. The property owner if he has filed objection to such assessment, may appeal from the assessment to the circuit court of the county in which the property is located within thirty days after such assessment becomes final, by giving notice in writing to the tax assessor and by filing a copy of such notice with the clerk of the circuit court and giving bond to be approved by and filed with the clerk of the circuit court to cover costs

and thereafter such case shall be tried as other tax cases appealed to the circuit court from the board of equalization. The taxpayer or the state shall have the right to demand a trial by jury by filing a written demand therefor, within ten days after the appeal is taken. Whenever any escape assessment is made final, the taxes shall immediately become due and the assessor or deputy assessor shall forthwith certify the assessment to the tax collector, who shall forthwith collect same, unless at the time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the clerk of the circuit court in double the amount of the taxes, payable to the state of Alabama, conditioned to pay all taxes, interest and costs due the state, county or any agency or subdivision thereof. (Ib.; 1953, p. 302, appvd. July 27, 1953.)

* * * * * * *

§ 913. **Refund on over-payment directly to department of revenue.**—Where any taxpayer in the payment of taxes or licenses which are paid directly to the department of revenue, and where by a mistake of fact or law has paid an amount in excess of the amount due or has made an erroneous payment, the comptroller is authorized to draw his warrant on the treasurer in favor of such taxpayer, and the treasurer is authorized to pay such warrant for the amount of such over-payment or erroneous payment.

Before any refund under this section can be made the taxpayer, his heirs, successors or assigns, shall file in duplicate, petition directed to the department of revenue, setting up the fact relied on to procure the refunding of the money erroneously paid. Such application must be made within three years from the date of such payment.

The department of revenue shall examine said petition and the records of the department of revenue, and if the

facts set forth in the petition are such as to entitle the petitioner to the refunding of the money as prayed for and the department of revenue, upon the evidence adduced is satisfied that the petitioner is entitled to the refund as prayed for, he shall so certify to the comptroller stating the amount to be refunded by the state, the particular fund on which warrant shall be drawn and forward to the comptroller copy of the petition with the certificate attached, and if the comptroller shall be satisfied that the petition is in form required by law, he shall draw his warrant on the treasurer as hereinbefore provided for the amount certified to him by the department of revenue. (1931, p. 527; 1951, p. 1481, § 1, appvd. Sept. 12, 1951.)

APPENDIX B.

The State of Alabama—Judicial Department

The Supreme Court of Alabama

Special Term, 1965

3 Div. 100

Phillip J. Hamm, as Commissioner
of Revenue of the State of Alabama

v.

W. D. Harrigan and Dorine Harrigan

and

3 Div. 100-A

Phillip J. Hamm, as Commissioner
of Revenue of the State of Alabama

v.

Virginia H. O'Melia and T. H. O'Melia

Appeal From Montgomery Circuit Court.

Coleman, Justice.

The commissioner of revenue appeals from two judgments of the Circuit Court of Montgomery County which awarded peremptory writs of mandamus commanding the commissioner to certify to the comptroller that certain sums of money are due to be refunded to the taxpayers, who are the appellees, to the end that the State's warrants shall be drawn so as to make the specified refunds to the taxpayers.

Two cases were tried together and have been so argued on this appeal. The issues in both cases are the same. We shall refer to them as if there were only one case and

to the appellees in the singular as if there were only one taxpayer.

The essential facts, as we understand them, are that the taxpayer paid to the State income tax for 1958; that the amount of the tax paid was based and computed on a sum which taxpayer received as a "liquidating dividend" of an Alabama corporation; that the computation was made on the erroneous and illegal premise that taxpayer was required to treat as part of his taxable income an amount equal to the unrealized appreciation in value of certain timberlands which were distributed in kind to the stockholders as liquidating dividends; that the computation was based on the further erroneous premise that such appreciation in value was not exempt from income tax under § 388, Title 51, Code 1940, which exempts "liquidating dividends paid from income of domestic corporations on which the corporation distributing such dividends has paid all income taxes due the State of Alabama in the current or prior tax years"; that the assets so distributed had been acquired from the original capital and the earnings of the corporation; and that the corporation had paid to the state all income taxes due to the state.

It further appears that taxpayer timely filed income tax return; that the department of revenue assessed a tax deficiency; that taxpayer waived notice and requested that the assessment be made final; and that the department did make the assessment final on December 30, 1959. The waiver and assessment in one case recite as follows:

Waiver.

"The undersigned attorney at law, duly representing the taxpayers, W. D. and Dorine Harrigan, Fulton, Alabama, in the above matter, and with full authority in the premises, does hereby waive all notice required to be given said taxpayers under the Income Tax Law of the State of Alabama leading to

the final assessment of said income taxes; more specifically said taxpayers hereby waive all notice with respect to the assessment of income taxes against them as required and provided by Section 407, Title 51, Code of Alabama 1940, including notice for hearing any protest regarding making of the assessment for income taxes final; and further waiving notice as to the time and place of hearing any protest as contemplated by said Section 407. Said taxpayers for reasons deemed most beneficial to them hereby and by these present do urge and request the Department of Revenue to make final the assessment of income tax against them on December 30, 1959 for the calendar year 1958 in the amount of $156,982.16.

"The taxpayers herein by requesting the assessment for income taxes against them be made final immediately, hereby reserve the right to appeal from said final assessment in the manner which the law permits them to do."

Final Assessment.

"Whereas, on the 30th day of December, 1959, the State Department of Revenue made an assessment against W. D. and Dorine Harrigan (hereinafter called Taxpayer) for additional income tax due by said Taxpayer under the provisions of the Alabama Income Tax Act (Title 51, Sections 373, et seq., Code of Alabama 1940), for the calendar year of 1958 together with penalty and interest thereon, in the amount as follows:

"Additional income tax	$150,582.41
"Penalty thereon	
"Interest on said tax from the date the same became due to the date of said assessment	6,399.75
"Total amount assessed	156,982.16

"and

"Whereas, notice of said assessment and of the day set for the hearing thereof has been waived by said Taxpayer, the said Taxpayer having requested that the Department immediately make said assessment final without notice; and

"Whereas, it appearing that said assessment is correct and should be made final;

"It Is, Therefore, Ordered by the State Department of Revenue that said assessment be and the same is hereby made final, and that execution be issued thereon."

The total amount assessed in the other case is $215,456.74. We understand that taxpayer paid the amount assessed, but did not appeal within thirty days as provided by § 140, Title 51, Code 1940.

Taxpayer subsequently learned of the decision in **Buchanan v. State**, 274 Ala. 592, 150 So. 2d 200, originally delivered October 18, 1962. In **Buchanan**, this court held that, under § 388, Title 51, Code 1940, a liquidating dividend, paid by a domestic corporation, was exempt from income tax, when the corporation had paid all income taxes due to the state, the dividend was distributed in kind, and the assets distributed had been acquired by the corporation solely from earnings and income of the corporation. We emphasize here that in **Buchanan**, taxpayer appealed under § 140, Title 51, from a final assessment of additional income tax, and did not proceed under § 410 as the taxpayer has done in the instant case.

On December 27, 1962, after the time for appeal had expired, but within the time allowed by § 410, Title 51, the taxpayer made application for refund of the amount paid. The department of revenue refused to certify to the comptroller the amount claimed, or any amount, and

taxpayer instituted statutory mandamus proceedings in the circuit court as provided by § 410. The court rendered judgment granting the writ, and from the judgment the commissioner appeals.

The commissioner insists that the refund procedure provided by § 410 is not available where taxpayer has suffered a final assessment under § 407 and has not appealed therefrom as provided by § 140. Taxpayer argues to the contrary.

The commissioner argues that an assessment under § 407, Title 51, from which no appeal is taken, is conclusive and final as any other judgment of a court and cannot be altered or set aside by a proceeding under § 410, or by any proceeding other than one by which the final judgment of a court can be revised or set aside after the time for appeal has expired.

The question for decision is, does § 410 apply when an assessment has been made final under § 407 and no appeal has been taken under § 140?

We consider first the authorities relied on by taxpayer.

In **Curry v. Johnston**, 242 Ala. 319, 6 So.2d 397, the taxpayer instituted a proceeding to obtain a refund of overpayments of income tax. The application for refund appears to have been made under Section 345.36 of Act No. 194, approved July 10, 1935, General Acts 1935, page 256, at page 422; which is the progenitor of § 410, Title 51. The trial court overruled the demurrer to the petition for mandamus. The demurrer raised the point that the application for refund was required to be made within twelve months of the date of payment. This court reversed for error in overruling the demurrer. The opinion recites that "This ruling presents the sole question for review." This court decided that Section 345.40 of Act No. 194; § 414, Title 51; made reference to General Acts 1931,

page 527, Section 2, which required that application for refund be made within twelve months of the date of payment. See § 913, Title 51, for present provisions of this latter statute. The holding is that the statute required application for refund to be made within twelve months and that this point raised by demurrer was well taken. We find no holding in the opinion that § 410 is available to the taxpayer in cases where a final assessment has been made under § 407 and no appeal has been taken. The opinion does not disclose that the question presented in the instant case was presented in **Curry v. Johnston,** supra, and it is certain that the instant question was not decided there. We do note that, with reference to § 407, the court said:

> "But the 'assessment,' meaning the final amount found to be due by the Commission (§ 345.33), Code 1940, Tit. 51, § 407, is required to be made within two years after the return was filed 'and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.' § 345.38, Code 1940, Tit. 51, § 412." (242 Ala. at page 321.)

With reference to the application for refund and time for bringing suit, the court said:

> "It is contemplated the taxpayer may make his application immediately after payment and **before any assessment is made by the Commission.** In such case, he must wait for three months to give time to make the assessment, before bringing suit. Many statutes fix limits for presenting claims, as a condition precedent to the right to sue, and a different limitation for bringing suit after taking the preliminary steps required." (Emphasis supplied.) (242 Ala. at page 321.)

The court does use the word "assessment," when it says that he, meaning the taxpayer, ". . . must wait for

three months to give time to make the **assessment**, before bringing suit." (Emphasis supplied.) The reference is obviously to the second sentence of § 414, Title 51, which, in pertinent part recites:

> ". . . No such suit or proceeding shall be begun before the expiration of three months from the date of filing such claim unless the department of revenue renders a decision thereon within that time. . . ."

The "assessment" referred to in the opinion is not an assessment made in a proceeding under § 407. The first sentence of § 414, expressly excepts from the restrictions of that section proceedings brought under § 407. The "assessment" referred to in the opinion is the "decision" of the State Tax Commission (now department of revenue) referred to in the statute. More accurately, the opinion states that the taxpayer must wait three months, to give the Commission (department of revenue) time to make a decision to allow or reject taxpayer's application for refund, before bringing suit. We are of opinion that **Curry v. Johnston** does not support the contentions of taxpayer.

In **State v. Brown**, 254 Ala. 215, 48 So.2d 36, this court held a taxpayer entitled to refund for certain income tax paid to the state. The opinion refers to a stipulation that "taxpayer duly and properly filed application for refund of income tax," and the record discloses such an application. The case, however, was not a proceeding for refund under § 410. This court did note that taxpayer filed petition for refund under § 410, but the petition for refund was filed before the assessment was made final, because the assessment was not final until made so by the decision of this court. We have examined the transcript in **State v. Brown**, supra. It discloses that the proceeding in the circuit court was an appeal from final assessment pursuant to § 140, Title 51. The bill of complaint and the decree of

the trial court so recite. The opinion of this court recites that "Agreements were made from time to time . . . extending the time for making the final assessment. . . ." **Brown** sheds no light on the question as to what is the finality of an assessment under § 407, which was not appealed, with respect to § 410. Nothing in **Brown** supports taxpayer's contention in the instant case.

In **Horn v. Dunn Brothers, Inc.**, 262 Ala. 404, 79 So.2d 11, the trial court, pursuant to a prior decree declaring taxpayer entitled to a mileage tax refund, ordered the commissioner to grant taxpayer's application for the refund. On appeal by the commissioner, this court held that the prior declaratory decree was a final decree, that "Having elected to take no appeal from the (prior) decree of 29 February 1952, the State Department of Revenue lost its right of appeal. Our consideration is accordingly limited to the trial court's decree of 15 May 1953, from which this appeal is prosecuted." (Par. added.) Being limited to the last decree, this court did not review the prior decree. The opinion does not disclose whether the department of revenue had made any assessment comparable to the final assessment under § 407, which was made in the instant case. If such an assessment had been made in **Horn v. Dunn Brothers, Inc.**, however, the question whether the assessment was a final judgment and a bar to the relief granted to taxpayer, in the prior decree of 29 February 1952, was a question which should have been raised in the proceedings which were had prior to the rendition of the February decree. The commissioner did not appeal from that decree and this court refused to go behind that decree when the commissioner sought to appeal from the May decree. The result is that the question of the finality of the assessment, if such there was, never reached this court, and the **Dunn Brothers** case is not authority that an assessment made final under § 407 is not a bar to relief under § 410.

In **Graves v. McDonough**, 264 Ala. 407, 88 So.2d 371, this court affirmed a decree declaring that the comptroller should draw a warrant in favor of taxpayer as a refund for taxes paid under an escape assessment. The taxpayer asserted that the escape assessment had been made under authority of § 53, Title 51, which provides for notice to the taxpayer, opportunity to appear and be heard, appeal to the circuit court, and trial by jury. Apparently, taxpayer had not appealed as provided by § 53. This court considered whether failure to pursue the statutory remedy for review barred the declaratory proceedings and concluded that the declaratory proceeding was not barred for such failure. The court said:

> "Section 53, Title 51, supra, provides that the tax assessor shall give notice of the escape assessment, and that such person may appear within twenty days and make objection to the assessment, and appeal to the circuit court from an adverse ruling. If no objection is made, the tax assessor shall make the assessment final. But we think the taxpayer by failing to object was not cut off from other remedies which he may have had to contend that the assessment was void for want of legal authority, and to obtain a refund. The assessment is void under the authority of State v. Mortgage-Bond Co. of New York, supra [224 Ala. 406, 140 So. 365]. Being void, the taxpayer was not required to pursue any certain remedy to get it so declared and obtain a refund. 'The necessity for pursuing the statutory remedy does not exist where the assessment complained of is void and illegal.' 84 C.J.S., Taxation, § 513, Note 90" (264 Ala. at page 409).

The income tax assessment in the instant case is not void, as we understand it. The assessment may well be erroneous under **Buchanan v. State**, supra. The depart-

ment of revenue had jurisdiction of parties and subject matter. Since the assessment was not void, the rule applied in **Graves v. McDonough**, supra, does not apply here. In **Graves v. McDonough**, this court said:

> " 'It is the general rule that a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before the administrative body empowered initially to correct the error. * * * An exception is made when the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction.' Security-First Nat. Bank v. Los Angeles County, 35 Cal. 2d 319, 217 P. 2d 946, 947; Bank of America Nat. Trust & Savings Ass'n v. Mundo, 37 Cal. 2d 1, 229 P. 2d 345." (264 Ala. at page 409.)

In the case at bar, the assessment is not within the exception, but is within the general rule, and the **McDonough** case seems to be authority in favor of the commissioner and against the taxpayer.

In **State v. First National Bank of Auburn**, 273 Ala. 379, 141 So. 2d 196, this court considered the finality of an excise tax assessment made under § 425, et seq., Title 51. The question arose when taxpayer undertook to carry back to 1952 (tax year 1953), a loss which occurred in 1953 and 1954. The state contended that the assessment for 1952 was made final on July 2, 1953, that taxpayer did not appeal under § 140 within thirty days, and, therefore, that there was no way to re-open the assessment and allow a carry-back of the loss sustained in subsequent years. This court rejected that contention, saying that to disallow the carry-back would be to nullify the statute, which expressly authorized the carry-back, and defeat the legislative intent. It seems clear that if, in a tax year, a taxpayer made a profit and owed income tax, he would pay the tax without appealing the assessment; and, if he

subsequently suffered a loss, the only way he could carry the loss back would be to re-open the prior assessment. Subject to the restrictions of the Constitution, the legislature has power to provide for the collection of income taxes and to provide for the manner of calculating the tax in allowing relief for losses. The allowance of the carry-back was part of the manner of calculation prescribed by the legislature, and was allowed for that reason. In the instant case, we are not concerned with a legislative act which compels the re-opening of an assessment in order to make the act effective. Neither the facts nor the statute have changed since the assessment was made final in the case at bar. When the assessment was made final, all the facts now relied on by taxpayer were in existence and available to him. In the waiver and request for assessment, he reserved the right to appeal, but did not do so. A change in the statute, similar to that which led to the decision in **State v. First National Bank of Auburn**, does not exist here. Actually the appeal in the last cited case was from an assessment for a year other than 1953. The court said:

> "Appellee unquestionably is entitled either to a refund of the excise tax paid in the amount of $539.13 for the tax year 1953, by reason of a carry-back to that tax year of a loss in the amount of $8,985.51, or to a credit of said loss against its net income for the tax year here involved as a carry-over to that year. In either event, the same amount of excise tax is involved. Since the State has rejected appellee's application for a refund, by way of a carry-back, what ground is there for denying appellee relief by carrying the loss over to the tax year here involved? Aside from any other consideration, to deny such relief would be unjust. . . ." (273 Ala. at pages 382, 383.)

We are of opinion that the last cited case does not support the decree appealed from in the case at bar.

In **Bull v. United States**, 295 U. S. 247, 55 S. Ct. 695, 79 L. Ed. 1421, the court considered the case of the estate of a taxpayer against which the government asserted claims for both income and estate taxes. Through mistake, the government collected more estate tax than was due. Taxpayer paid the tax and time for bringing a proceeding for refund expired. Subsequently, however, the government brought a new proceeding, arising out of the same transaction, for income tax. The court held that taxpayer could, in the latter proceeding, recoup the excess estate tax he had paid, although an independent proceeding for refund was barred by the statute of limitations. The taxpayer's right to recover was rested solely on the bringing of the latter suit. As to what would have been the situation if the latter suit had not been brought, the court had this to say:

> "In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience. But claim for refund or credit was not presented or action instituted for restitution within the period fixed by the statute of limitations. If nothing further had occurred Congressional action would have been the sole avenue of redress." (295 U. S. at pages 260, 261.)

In the case at bar, no second suit has been brought against the taxpayer and there is no suit in which he may be permitted to recoup or offset the excess tax he has paid.

Both sides rely on **State v. Woodroof**, 253 Ala. 620, 46 So.2d 553. We think the holding in **Woodroof** is reason for holding that the court erred in ordering the refund in the instant case.

In **Woodroof**, this court considered the priority of certain liens for taxes due the state, over liens due the United States, in a proceeding for dissolution of a corpo-

ration. With respect to the perfection of a lien, this court said:

> ". . . In the controversy before us, we will act on the assumption that if on June 4, 1948, the State had a lien for taxes due it on the property that went into the hands of the receiver, and that such lien was specific and perfected, we should hold that it took priority over the claim of the United States upon the free funds in the receivership, which arose from a sale of the property on which such lien existed at that time. . . .
>
> "And we think, as applied to a state's claim of a lien for taxes, such lien is specific and perfected, if the amount of it has been fixed by a proceeding which is binding and conclusive at the date of receivership, and not open for change in any sort of proceeding which might arise thereafter; and that the lien upon the property which was received by the receiver was not dependent upon any contingency, nor subject to selection, shift or change, and nothing remained to be done then or thereafter to make such lien complete, specific or perfect, or to liquidate the debt, and nothing could be done thereafter to discharge the debt or subordinate such lien but full payment of the debt . . ." (253 Ala. at page 630).

The court discussed first an income tax claim of the state for $36.22. With respect to §§ 407 and 410, Title 51, the court said:

> ". . . Section 407, Title 51, Code, directs the manner of making the assessment upon hearing and provides for an appeal, as provided in section 140, Title 51. Such assessment has judicial qualities. Birmingham Vending Co. v. State, 251 Ala. 584, 38 So.2d 876. **A judgment on appeal under section 140, *supra*, is as final as any other judgment. An assessment from**

which no appeal is taken is likewise conclusive when the procedure provided in section 407, Title 51, is complied with. (Emphasis supplied.) If no such procedure as there provided is pursued, the amount shown by the taxpayer's return is *prima facie* the correct amount of his tax liability. If nothing further is done as to his return, such amount remains *prima facie* correct. In that event, it has not become a fixed liability until it shall be assessed, which must be done, if at all, within two years. Section 412, Title 51, Code. The amount of tax so imposed shall be paid on the 15th day of the third month following the close of the fiscal year (subject to future installment payments). This taxpayer was on a fiscal year basis, as of October 31st. The record in this case does not show that there was any assessment made of this income tax as provided in section 407, supra, but the return of the taxpayer was only *prima facie* the correct amount of his liability. And any payment of same was subject to a refund within two years if erroneous. Section 410, Title 51, Code; Curry v. Johnston, 242 Ala. 319, 6 So.2d 397. The amount of the debt secured by the lien was not effectually fixed and, therefore, the lien was not specific and perfected'' (253 Ala. at page 631).

Thus the court held that the income tax lien was not perfected because the procedure of § 407 had not been followed and because taxpayer, in such case, could apply for refund under § 410. The court says that a judgment on appeal under § 140 ''is as final as any other judgment,'' and an assessment, from which no appeal is taken, ''is likewise conclusive,'' when § 407 is complied with.

In the case at bar, § 407 was complied with and no appeal was taken. Under **Woodroof**, the instant assessment was final and conclusive as any other judgment, and

was not open for change in any sort of proceeding which might arise thereafter."

This conclusion is fortified by the court's decision in **Woodroof** as to the finality of a sales tax claim for $741.71, which was made final under § 767, Title 51. The court said:

> "The final assessment not appealed from is as conclusive as the judgment of an ordinary court. It is the judgment of a tribunal constituted a court by the legislature as authorized by section 139 of the Constitution, and is conclusive as such. Being rendered on March 29, 1948, and no appeal having been taken in thirty days, section 140, supra, no attack can be made upon it except such as applies to an ordinary court judgment. It therefore conclusively fixed the amount of the tax claim as of March 29, 1948. State ex rel. Carmichael v. Jones, 252 Ala. 479, 41 So.2d 280 (10, 11).
>
> "Section 883, Title 51, Code, provides for a lien for its payment, when such payment is not made, to cover all property and rights to property real or personal belonging to such person. There is no selection to be made. There is no contingency in connection with it. It is simply all of it. That means **all**, not a **portion** to be selected or identified by some formula. And that was the status on June 4, 1948, when the receiver was appointed. If a tax lien can be specific and perfected as of that date, this was of that class . . ." (253 Ala. at pages 631, 632).

It seems to us that **Woodroof** is authority that the assessment in the case at bar was final and not subject to revision or refund by a proceeding under § 410.

The reporter will set out § § 407 and 414, Title 51, Code 1940, and § 410 of same title as amended by Act No. 826, 1951 Acts, page 1457.

§ 407 provides that income tax shall be "assessed" upon blanks in the form to be prescribed by the department of revenue. The assessment so made by taxpayer is not final, but shall constitute a "prima facie" liability, and the words "assessment" or "assessed," as used in the statute, "mean the final determination of the amount found to be due by the department . . ." If the amount so determined is different from the amount shown by the return, then a day must be set for hearing and notice and opportunity to be heard must be given to the taxpayer. **State v. Pollock**, 251 Ala. 603, 38 So.2d 870. On the day set, the department must ". . . **finally** fix, determine and assess the amount of tax due and notify the taxpayer . . ." (Emphasis supplied.) Within thirty days he may appeal to the circuit court, and, if successful there, he may appeal to this court. § 140, Title 51.

There are thus three opportunities for a judicial determination of taxpayer's liability. The first determination is made by the department of revenue.

". . . The Department of Revenue administered by the commissioner is the State tribunal designated by law with judicial functions to pass upon questions of fact or law which may arise in making an assessment (Citations Omitted)". **Birmingham Vending Company v. State**, 251 Ala. 584, 588, 38 So. 2d 876.

The second determination is made by the circuit court, in equity. On the trial there, the assessment by the department is prima facie correct. The court shall hear the appeal according to its own rules as practicable. The trial, in effect, is de novo.

The third determination is made by this court. The trial here is, of course, a review based on the record made in the circuit court.

The question arises, which, if any, of the three determinations shall be final so as to bar another proceeding

for refund under § 410? Is the decision by this court, on appeal, final, or may taxpayer lose here and then bring a new proceeding under § 410? Suppose taxpayer does not appeal from the circuit court. Is the decision of the circuit court final, or may the taxpayer then bring a new proceeding under § 410? Then, there is the question in the instant case, i. e., may the taxpayer simply not appeal the assessment made by the department of revenue and bring a new proceeding under § 410?

To hold that the legislature intended, by § 410, to provide for a new proceeding to determine the same question after it had been decided once by this court would be contrary to the principle that a matter once adjudicated is finally settled and determined. **Irwin v. Alabama Fuel & Iron Company**, 215 Ala. 328, 110 So. 566. To hold that a decision by the circuit court, on appeal to it under § 140, is not final and a bar to a new proceeding under § 410, would run counter to the same principle. Why would not a holding that a decision under § 407 is not final be equally contrary to that principle?

In **Woodroof**, this court construed § § 407 and 410 to the effect that a taxpayer who had not suffered a final assessment under § 407, had the right to apply for refund under § 410; but a taxpayer, who had suffered a final assessment under § 407, does not have the right to apply for refund under § 410. We are of opinion that the construction in **Woodroof** is correct and that we ought not to depart from it.

Woodroof was decided in 1950. In 1951, the legislature reenacted § 410, without material change other than substituting "three" for "two" in the second sentence. It is a familiar rule that where a statute has been construed, and is reenacted without material change, such construction must be accepted as a part of the statute. **Lindsey Lumber & Export Co. v. Deas**, 230 Ala. 447, 161 So. 473.

Taxpayer places some reliance on § 414 of Title 51, wherein the legislature provided that no proceeding shall be maintained for recovery of any tax "alleged to have been erroneously or illegally **assessed** or collected" (Emphasis Supplied) until claim for refund has been filed with the department of revenue. Taxpayer relies on the use of the word assessed.

We do not think § 414 has the effect of giving taxpayer a remedy under § 410 where he has suffered a final assessment under § 407 and has not appealed. § 414 gives no rights; it limits or takes away rights of the taxpayer. Moreover, a proceeding under § 407 is, in some respect, expressly excepted from the operation of § 410. It is notable also that § 410 has, and § 414 has not, been reenacted since **Woodroof** was decided.

Taxpayer, in brief, concedes, of course, that **Buchanan** is not res judicata here, but says that it is " . . . equally obvious this Court intended **Buchanan** to have future application in all cases involving similar facts." We agree that the rule in **Buchanan** should apply to all taxpayers alike, but we do not agree that there has been unequal application of the rule here, or any unequal treatment of the instant taxpayer.

The instant taxpayer had the same opportunities and the same rights which the taxpayer enjoyed in **Buchanan.** As we understand it, the statutes were the same in both cases. Taxpayer says that the facts were the same in all material aspects. What then is different?

As it seems to us, the difference is, that in **Buchanan,** the taxpayer took an appeal under § 140, Title 51, and the instant taxpayer, for good and sufficient reasons which are known to him but not to this court, chose not to appeal under § 140. Where the instant taxpayer was accorded the same right which the other taxpayer had, but did not exercise it, we do not think that the law favored

one over the other, or, in any sense, denied to either of them that which was his exact and equal due.

On the trial of the instant case, counsel for taxpayer stated to the court:

> ". . . There is no dispute between us that a final assessment was entered by the State of Alabama and that no appeal under Section 140 was taken. . . ."

The following colloquy occurred between the court and counsel for the commissioner:

> "The Court: The only issue raised by the State is the right to bring this action when no appeal was taken from the assessment. Is that the only issue raised by the State?
>
> "Mr. Miller: Your Honor, that is one of the issues, and it is the primary issue raised by the State that mandamus is not the proper action at this point. . . ."

For reasons we have undertaken to state, we are of opinion that the state's contention is well taken and that the decree for the taxpayer should be reversed and the cause remanded for entry of a decree not inconsistent with this opinion.

Reversed and Remanded.

Livingston, C. J., and Lawson and Goodwyn, JJ., concur.

I, Richard W. Neal, Deputy Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 9 day of Sept. 1965.

Richard W. Neal,
Deputy Clerk, Supreme Court of Alabama.

3 Div. 100 and 100-A—Hamm, as com'r, etc. v. Harrigan and Harrigan—And Hamm, as Com'r, etc. v. O'Melia and O'Melia.

Addenda.

Coleman, Justice.

On September 9, 1965, during a special term, the court rendered decision on these appeals. The special term ended Friday, October 1, 1965. The regular term began on the first Monday of October, which was October 4, 1965. § 20, Title 13, Code 1940. On October 13, 1965, appellees filed a petition asking that we place these causes on the rehearing docket.

Appellees did not make application for rehearing within fifteen days as provided by Supreme Court Rule 34. 261 Ala. XXXII; Appendix, Title 7, 1958 Recompilation of Code 1940.

The request or motion appellees undertake "to make comes too late, at a time when this court has lost its power to alter its decree. Motion of appellant is stricken." **Morrison v. Formby**, 191 Ala. 104, 109, 67 So. 668.

See **Martin v. State**, 22 Ala. App. 191, 113 So. 452, where the court observed, with respect to a judgment rendered at a prior term:

> "... we are driven to the conclusion that this court has lost control of this judgment; otherwise every judgment in every case rendered at the October term, 1926-27, of this court, would still be in the breast of the court and subject to change—a condition not to be contemplated." (22 Ala. App. at page 193.)

See also **Donnell v. Hamilton**, 77 Ala. 610, 612, where the court said:

> "This presents the question, whether this court can set aside its own judgment and decree, after ad-

journment of the term at which it was rendered. We think it can not do so, unless the judgment or decree which is sought to be set aside is void on its face. . . ."

If this court has jurisdiction to change a decision made in the last term, which has expired, why would the court not have jurisdiction to change a decision made at the term next before the last, or at some still earlier term?

If the court had such power, there could be no end to litigation and the public good demands that there be such an end.

Opinion extended.

Petition stricken.

Livingston, C. J., and Lawson and Goodwyn, JJ., concur.

I, Richard W. Neal, Deputy Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 21 day of Oct., 1965.

Richard W. Neal,
Deputy Clerk, Supreme Court
of Alabama.

In the Circuit Court of Montgomery County, Alabama.

W. D. Harrigan and Dorine Harrigan, Petitioners,

v.

Phillip J. Hamm, as Commissioner of Revenue of the State of Alabama, Respondent.

No. 4119.

Judgment Ordering Per-Emptory Writ of Mandamus.

This cause comes before the Court at this time on the petition for mandamus, as amended by agreement in open Court, and attached exhibits; the alternative writ of mandamus directed to respondent; the return to the alternative writ and exhibits thereto. The cause was tried by the Court without the intervention of a jury; and this Court, after having heard oral testimony, having received documentary evidence, and having heard argument of counsel for petitioners and respondent, makes the findings and enters the judgment set forth below.

The parties have stipulated that the petition for refund filed on December 27, 1962, with the State Department of Revenue was in regular form as required by Title 51, Section 410, Code of Alabama, 1940, as amended, and sought refund of income taxes paid through a mistake of law or erroneously or illegally assessed or collected for the calendar year 1958 in the total amount of $159,744.45, together with interest from the date of payment at the legal rate. By stipulation it was shown that the petition for refund was denied on April 30, 1963, on the ground stated in said denial which has been introduced in evidence in this proceeding. In addition, the parties do not question that if petitioners are correct in their contentions,

they are entitled to a refund of income taxes paid in the foregoing amount, plus interest at the legal rate from date of payment.

Findings.

The underlying facts of this case are undisputed. These taxpayers, as their petition, attached exhibits, and testimony of their accountant, Henry Barclay, show, paid the foregoing income taxes to the State of Alabama for the calendar year 1958 on a portion of a liquidating dividend received by petitioner W. D. Harrigan from Scotch Lumber Company, Inc., a domestic corporation, organized and then existing under the laws of the State of Alabama. It is undisputed that the liquidating dividend paid by this said corporation to petitioner W. D. Harrigan, insofar as it was paid in kind in assets, was paid in assets acquired by this domestic corporation solely from earnings and income of the said domestic corporation, on which the said corporation had properly reported and paid all of its income taxes due to the State of Alabama on all of its income for each year during its entire existence, from the date of its incorporation in Clarke County, Alabama, on January 1, 1946. It is undisputed that all of the assets of this said domestic corporation, other than its original capital, were acquired by this said corporation from its earnings and income on which all income taxes due the State of Alabama were paid.

The State Department of Revenue had made adjustments to income and recomputation of income tax so as to require that petitioners pay an additional amount of $159,744.45 as income taxes for the year 1958 on the premise that unrealized appreciation in the value of certain assets of this said domestic corporation, namely, certain timberlands which were distributed as liquidating dividends to the stockholders of the corporation, was income to petitioners and not exempt under Title 51,

Section 388, Code of Alabama, 1940, as amended. It is undisputed that while the timberlands had appreciated in value, they had been acquired, except for the original capital contribution, solely from earnings and income on which all income taxes due to the State of Alabama had been paid, and that the same had not been sold and no profit or income had been realized therefrom either by the said domestic corporation or by petitioners.

Following conferences between petitioners' tax representatives and representatives of the State Department of Revenue, taxpayers acceded to the contentions of the Department of Revenue and agreed to pay the aforesaid additional income taxes asserted against them. Their accountant and tax representative, Barclay, testified that taxpayers waived statutory notice for final assessment so that this tax matter could be concluded in the calendar year 1959. He testified that taxpayers deemed it beneficial to be able to deduct this amount of additional state income taxes from their federal income tax for the year 1959.

Thereafter, on October 18, 1962, the Supreme Court of Alabama construed and interpreted Title 51, Section 388, in the case of **R. W. Buchanan v. State of Alabama,** now reported in 274 Ala. 592, 150 So.2d 200. On precisely similar facts, the Supreme Court held that a liquidating dividend, such as that distributed by Scotch Lumber Company to petitioner W. D. Harrigan, was exempt under Title 51, Section 388, Code of Alabama, 1940, as amended, and that the contrary interpretation of the State Department of Revenue was erroneous and illegal. This **Buchanan** case was one of first impression on this question, and is, of course, controlling authority as to the meaning, scope and effect of Title 51, Section 388, supra. The decision of the Supreme Court, accordingly, showed that the State Department of Revenue and petitioners had misconceived this relevant Alabama in-

come tax law and had been mistaken about its meaning and effect.

Respondent concedes through his return, through his denial of the petition for refund, and by statements of his counsel in open Court, that the transactions upon which these taxpayers paid additional Alabama income taxes of $159,744.45 were precisely the same as those involved in the aforesaid **Buchanan** case; and respondent concedes that the inclusion of any portion of the aforesaid liquidating dividend as taxable income to petitioners for the calendar year 1958 and the ensuing assessment of additional income taxes in the amount of $159,744.45 were illegal and wrongful. Thus, it is undisputed that the State Department of Revenue has erroneously or illegally collected income taxes from petitioners which are not due.

The question in this case, in view of the undisputed facts and the admissions of respondent, is simply a procedural one. Respondent contends that because petitioners did not appeal from the final assessment entered on December 30, 1959, pursuant to and within the thirty days permitted by Title 51, Section 140, Code of Alabama, 1940, they are barred from seeking refund by means of a timely petition filed under Title 51, Sections 410 and 414, Code, as amended. In answer to questions from the Court, counsel for respondent stated respondent's position that Sections 410 and 414 had no field of operation after a final assessment of income taxes has been entered.

Petitioning taxpayers on the other hand contend that when the mistake of law and the error which gave rise to the assessment of additional income taxes became apparent by the decision of first impression of the Supreme Court of Alabama in **Buchanan v. State**, supra, they could avail themselves of the procedure specified in Section 410 and thereby obtain restitution from the

State Department of Revenue of tax monies admittedly not due, but nevertheless withheld by the State of Alabama.

The Court concludes that the contention of the taxpayers is correct. Without dispute, the additional income taxes paid by petitioners pursuant to the 1959 assessment should not have been paid. The entire corporate distribution was exempt as a liquidating dividend of a domestic corporation under the provisions of Title 51, Section 388, supra, as definitively interpreted on precisely similar facts in **Buchanan v. State** (Ala.), 150 So.2d 200.

The Court is of the opinion that Sections 410 and 414 of Title 51 provide the means of obtaining refunds of taxes erroneously paid through mistake or error and which are not legally due. This refund machinery may be utilized within the period of limitations specified in Section 414 regardless of whether an assessment has been made by the State Department of Revenue. This is clear from the language of Section 410 that proceedings in the nature of mandamus may be instituted or prosecuted "whether or not the tax shall have been paid under duress or protest. . . ." It is also clear from the language of Section 414 which provides for the maintenance of such a proceeding for the recovery of taxes alleged to have been "erroneously or illegally assessed or collected . . . whether or not such tax penalty or sum has been paid under protest or duress."

The Court finds that the statutory language manifests a legislative intent that this refund and recovery procedure is available within the three year period of limitations and is not barred simply because a final assessment has been entered in the income tax proceeding.

The Court also finds that this legislative design accords with the salutary purpose of preventing a taxing sovereign from retaining what was illegally taken from a

taxpayer in violation of the sovereign's own statute. These statutes provide restitution to these taxpayers whose tax monies have been wrongfully and illegally withheld. **State v. First National Bank of Auburn**, 273 Ala. 379, 141 So.2d 196; **Bull v. United States**, 295 U.S. 247; **Curry v. Johnston**, 242 Ala. 319, 6 So.2d 397; **Horn v. Dunn Brothers**, 262 Ala. 404, 79 So.2d 11; **State v. Brown**, 254 Ala. 215, 218, 48 So.2d 36.

Order.

It is, therefore, Considered, Ordered and Adjudged as follows:

A per-emptory writ of mandamus does forthwith issue from this Court directed to Phillip J. Hamm, as Commissioner of Revenue of the State of Alabama, Ordering, Directing and Commanding him forthwith to certify to the Comptroller of the State of Alabama that the amount of Alabama income taxes to be refunded to petitioners, W. D. Harrigan and Dorine Harrigan, is $159,744.45, with interest thereon at the legal rate from the date of payment of such taxes; and to forward any other, further or different papers or certifications to the said Comptroller to the end that the said Comptroller may satisfy himself that the State's warrant shall be drawn for such refund in the above specified amount, plus interest thereon at the legal rate.

It is further Ordered and Adjudged by the Court that the said respondent, Phillip J. Hamm, as Commissioner of Revenue of the State of Alabama, shall pay all of the costs of this proceeding, for which let execution issue.

Done this .... day of June, 1963.

.....

Judge.

APPENDIX C.

The State of Alabama—Judicial Department

The Supreme Court of Alabama

October Term, 1962-63

3 Div. 971

R. W. Buchanan

v.

State of Alabama

Appeal from Montgomery Circuit Court, In Equity.

Simpson, Justice.

This case was originally assigned to another Justice and transferred to writer on September 9, 1962 for study and preparation of the opinion.

R. W. Buchanan (appellant) filed an appeal in the court below under § 140, Title 51, of the Code of Alabama of 1940, from a final assessment of additional income tax in the amount of $2,557.79. The assessment arose from the Revenue Department's having added as taxable income to the 1959 income of appellant R. W. Buchanan the sum of $51,773.17, received by appellant on March 31, 1959 as a liquidating dividend of a domestic corporation, Yellow Pine Lumber Company, Inc.

The portion of the liquidating dividend which was made the basis of the final assessment, namely $51,773.17, was paid in kind in assets acquired by the corporation solely from earnings and income of the corporation on which the corporation has paid all income taxes due the State of Alabama. The sum of $51,773.17 is the amount of appreciation in value of the assets distributed to appellant between the time they were acquired by the corpo-

ration and the time they were distributed to appellant as a liquidating dividend.

It is undisputed that the appreciation in value of the assets was not taxable income to the corporation, and that no Alabama income tax was due or payable thereon by the corporation.

Appellant contends that the entire liquidating dividend received by him was exempt from Alabama income tax under Title 51, § 388, of the Code of Alabama of 1940, as amended, for the reason that it was a liquidating dividend accumulated solely from the income of a domestic corporation on which the corporation has paid all income taxes due the State of Alabama in the current and prior years. Appellee contends that such portion of the liquidating dividend represented by appreciation in value of assets was not exempt under said § 388.

The case was heard before the trial judge on oral testimony of two witnesses and written exhibits introduced by both parties, and there is no dispute in the evidence. The trial judge rendered decree denying relief to appellant and affirming the assessment. From this decree appellant brings this appeal.

R. W. Buchanan (appellant) is a resident of Selma in Dallas County, Alabama. Yellow Pine Lumber Co., Inc., was a domestic corporation incorporated in Dallas County, Alabama, on January 28, 1942, with an original paid in capital of $25,000.00. All assets of the corporation, other than this original capital, were acquired by the corporation from its earnings and income, and the corporation properly reported to the State of Alabama all of its income and paid to the State of Alabama all income taxes due by the corporation on all of its income for the year 1959, and all prior years.

Yellow Pine Lumber Company, Inc., was dissolved on March 31, 1959, and all of its assets were distributed in

cash and kind to the stockholders as liquidating dividends in proportion to their ownership of stock. R. W. Buchanan was the owner of 25% of the stock of the corporation, and he was paid as a liquidating dividend 25% of the total assets of the corporation at the time of dissolution.

Regulation 388.1, State of Alabama Income Tax Regulations (1952), was introduced in evidence, and is as follows:

> "Every individual resident or non-resident taxpayer shall be entitled to exemption for dividends received as follows: A. Dividends received on stocks of domestic corporations which have paid all income taxes to the State are exempt. This applies to liquidating dividends of domestic corporations which have paid all income taxes due the State of Alabama in the current and prior years."

These regulations were promulgated on December 18, 1952, and constituted the regulations in the State Department of Revenue in effect during the tax year involved in this case, i. e., 1959. The evidence is undisputed that the State Department of Revenue and tax practitioners generally, in the State of Alabama, had uniformly, up to the time of the dissolution of this corporation, construed and treated as exempt all liquidating dividends received by Alabama residents from domestic corporations which had paid all Alabama income taxes due including distribution of assets which reflect appreciation in value between the time of acquisition by the corporation and the time of distribution as a liquidating dividend.

The sole question in this case is whether R. W. Buchanan (appellant) shall be denied the exemption provided by Title 51, § 388, of the Code on that portion of the liquidating dividend paid to him in kind, consisting

of assets acquired by the domestic corporation solely from income on which the corporation has paid all income taxes due the State of Alabama, merely because there was no Alabama income tax due or payable by the corporation on the appreciation in value of the assets distributed. We quote the pertinent provisions of § 388, Title 51, as amended, 1955 Cumulative Pocket Part, as follows:

> "The following exemptions from income taxation shall be allowed to every individual resident taxpayer: Dividends received on stocks of domestic corporations, including liquidating dividends paid from income of domestic corporations on which the corporation distributing such dividends has paid all income taxes due the state of Alabama in the current or prior tax years."

The State, in arriving at its conclusion that appellant is due the amount of income tax claimed and approved by the court below, takes an amount representing that portion of the liquidating dividend distributed to the stockholders upon which the corporation had paid all income taxes due the State for the current and prior years. It then determines the taxpayer's proportionate part of this amount, and deducts it from the total amount received by the taxpayer upon dissolution and distribution of all assets. From this remainder there is subtracted the amount paid by the taxpayer for his stock. This balance of the liquidating dividend received by the taxpayer, it is argued, "represents that portion of the liquidating dividend received upon which the corporation distributing it had not paid income taxes to the State of Alabama for the current or prior years". This argument is ingenious but not convincing. This portion of the dividend consists of the appreciation in value of the corporate assets accumulated solely from income, and as we have said above was not taxable in the hands of the

corporation. Had the corporation sold its assets, there would have arisen a question of tax due by it for profits realized. But it did not sell its assets; instead it distributed its assets in kind to its stockholders. The effort of the State is clearly one to charge the taxpayer upon the gain he realized over the price he paid for his stock, just as if he had sold his stock. But he did not sell his stock. What he did was receive assets in kind which, it is agreed, had appreciated in value. What profit he has derived, so far as appears, is an unrealized profit. In finality, the question of liability depends upon a construction of the statute, Code, Title 51, § 388, as we have copied it above.

Several of our cases have been cited to us to sustain the State's position. None deals in anywise with the exemption set up in § 388, supra. At most they state rules of statutory construction. That rule most pertinent is that exemption statutes are to be strictly construed in favor of the taxing authority.—**State v. Calumet & Hecla C. C. Co.**, 259 Ala. 225, 66 So. 2d 726, among many other cases. We fully recognize this rule and have consistently reiterated it. But we have as consistently added that this court will indulge no strained construction to give effect to such rule where a fair interpretation of legislative intent may lead to a contrary interpretation. In these and other cases we have said that arbitrary rules of construction are of little value when the real intent of the legislature can be gathered from the act itself.—**State v. Dawson**, 264 Ala. 647, 89 So. 2d 103; **State v. Taylor**, 262 Ala. 639, 80 So. 2d 618; **Hattemer v. State Tax Commission**, 235 Ala. 44, 177 So. 156; **Holt v. Long**, 234 Ala. 369, 174 So. 759; **State v. Calumet & Hecla C. C. Co.**, supra; **Crow v. General Cable Corp.**, 223 Ala. 611, 137 So. 657.

We perceive no ambiguity in the statute. The only problem then is applying the law to the facts. The cor-

poration was a domestic corporation. It had paid for current and prior years all income taxes due by it to the State. A part of its income went to acquisition of assets, lumber or whatever was its stock in trade and other assets incidental to its business. Increase in quantity and value we may assume took place not in one year but over the years of its corporate activity. It is not suggested that it was taxable per year or when it liquidated upon the enhancement of its assets. Thus it cannot be said that it did not pay all income taxes due the State. If it paid all income taxes due, dividends received by the stockholder were exempt to him. Since the assets distributed in kind to the stockholder were acquired solely from corporate income, such dividends were "paid from income", within the meaning of the words of the statute.

This exemption statute as it pertains to liquidating dividends, has not heretofore been before us. The most nearly analogous case from another jurisdiction coming to our attention is that of **District of Columbia v. Oppenheimer**, 301 F. 2d 563, recently decided by the United States Court of Appeals for the District of Columbia. In that case the corporation owned improved real estate which it held for income and not for sale. Oppenheimer was one of its stockholders. The District of Columbia assessed a deficiency in the stockholder's income tax, based on the difference between the amount she invested in the corporation and the value of the property it distributed to her when it was dissolved. The court there held that since the corporation never realized the appreciation by sale or otherwise, it was never a part of the corporation's income or earnings; in other words, did not realize a taxable gain. Unrealized appreciation in corporate assets, it was held, may not be reckoned in earnings or profits. The court draws an obvious distinction between unrealized appreciation and profits re-

alized by a sale of the property before distribution to its stockholders.

While we have based our decision upon our own interpretation of the statute, we observed hereinabove that prior to the situation giving rise to this case the Department of Revenue had promulgated and followed a regulation allowing the exemption as claimed by appellant. Whatever else may be said of the force and effect of the prior regulation, it is a generally recognized rule that contemporaneous administrative construction placed on a statute by officials administering the law is to be given consideration in interpretation of statutes.—**Glencoe Paving Co. v. Graves**, 266 Ala. 154, 94 So. 2d 872; **State v. Helburn Co.**, 269 Ala. 164, 111 So. 2d 912. Considering both the original and subsequent regulations of the Department, we are persuaded that the former is correct.

It results as our judgment that the decree appealed from is in error and must be reversed. A decree will be here rendered setting aside the assessment and granting to appellant the relief prayed.

Reversed and Rendered.

Livingston, C. J., Merrill and Harwood, J. J., concur.

APPENDIX D.

Organization of Court.

The State of Alabama,
Montgomery County.

At a regular term of the Circuit Court of Montgomery County, at which the officers authorized by law to hold or serve such Court were serving, the following proceedings were had in the cause styled Leo E. Bashinsky and Cora Y. Bashinsky, Plaintiffs vs. Harry H. Haden, as Commissioner of Revenue of the State of Alabama, Defendant:

Petition in the Nature of Mandamus.

Summons.

In the Circuit Court
For the Fifteenth Judicial Circuit
of Alabama.

State of Alabama,
Montgomery County.

To Any Sheriff of the State of Alabama—Greetings:

You are hereby commanded to summon Harry H. Haden, Commissioner of Revenue of the State of Alabama, to appear before the Circuit Court of Montgomery County, at the place of holding same within thirty (30) days after service of this process, and then and there to answer the Petition in the Nature of Mandamus of Leo E. Bashinsky and Cora Y. Bashinsky.

Witness, my hand and seal this the 25 day of July, 1961.

John R. Matthews, Circuit Clerk.

Petition in the Nature of Mandamus.

To the Honorable Walter B. Jones, Judge of the Fifteenth Judicial Circuit:

Come now Leo E. Bashinsky and Cora Y. Bashinsky, and respectfully show to Your Honor as follows:

1. That your petitioners, Leo E. Bashinsky and Cora Y. Bashinsky, are resident citizens of Jefferson County, Alabama, are husband and wife, and are over the age of twenty-one (21) years. That Harry H. Haden is a resident of Montgomery County, Alabama, is Commissioner of Revenue of the State of Alabama, and is over the age of twenty-one (21) years.

2. That heretofore, during the year 1955, Magic City Food Products Co., Inc., an Alabama corporation which has paid all income taxes due the State of Alabama in current and prior tax years, had arrived at a cross-roads in its corporate existence. Two of its largest shareholders, owners of over two-thirds (⅔) of its authorized and outstanding capital stock, wanted out. During the summer of said year, the directors had considered an outside proposal for dissolution of the corporation and sale of the assets, but the transaction was never consummated. The corporation had operated a successful food products business since 1946, but the said shareholders desired to withdraw because of their age. The existing management group of the company was responsible for its prosperity and the company's best interests would be served, it was believed, by retaining the present management personnel. Passing control of the corporation into inexperienced hands could result in the loss to the corporation of everything it had gained. It was equally undesirable to put the corporation to death. These ideas, intentions and circumstances, leading to the transaction at issue, are more fully set out in the Minutes of the meetings of the Board

of Directors of said corporation of December 21, 1955 and January 19, 1956. Copies of said Minutes are attached hereto and made a part hereof as if fully set out herein, marked Exhibits "A" and "B", and the facts stated therein are averred in this petition.

3. That it was then proposed that the company adopt and execute a plan of partial liquidation, redeeming the shares of the said two shareholders, C. A. Case and your petitioner Leo E. Bashinsky. By so doing:

1. The shares of the discontent majority could be redeemed;

2. The corporation itself and its profitable business operation could be preserved intact; and

3. The corporation was assured of retaining in its employ the persons to whom its success was primarily attributable, Sloan Y. Bashinsky and M. Halsey Townes.

The Board of Directors in its meeting of February 20, 1956, adopted the following resolution:

> "Resolved that the president be and he is hereby authorized, empowered and directed to redeem 954 shares in complete redemption of all the shares of stock of the corporation owned by L. E. Bashinsky and also to redeem 405 shares in complete redemption of all the stock of the corporation owned by C. A. Case, both redemptions to be at the price of $250 per share."

4. That pursuant to the said plan of partial liquidation, Magic City Food Products Co., Inc. paid to your petitioner Leo E. Bashinsky during the calendar year 1956, the sum of Two Hundred Thirty-eight Thousand Five Hundred and no/100 Dollars ($238,500.00) in redemption of all of his 954 shares of said stock. Petitioner's basis for said stock was Ninety-five Thousand Four Hundred and no/100 Dollars ($95,400.00).

5. That simultaneous with the redemption of petitioner's stock and pursuant to the plan of partial liquidation, said corporation redeemed all of the 405 shares of its capital stock owned by C. A. Case and, to-wit, 36 shares previously owned by petitioner Leo E. Bashinsky and given by him to his sons.

6. That said corporation redeemed 1,395 shares out of a total capitalization of 1,850 shares. Of the money so paid out by said corporation, One Hundred Seventy-five Thousand and no/100 Dollars ($175,000.00) was borrowed from The First National Bank of Birmingham, and One Hundred Seventy-three Thousand Seven Hundred Fifty and no/100 Dollars $(173,750.00) was paid from the Treasury of the corporation.

7. That on, to-wit, September 27, 1956, the stockholders of Magic City Food Products Co., Inc. made the final step in the partial liquidation, adopting the following resolution:

> "Resolved by the stockholders of Magic City Food Products Co. Inc. that it is in the interest of the corporation that its authorized capital stock be decreased from $185,000 to $45,500, and to that end paragraph number (4) of the Articles of Incorporation recorded in the Corporation Record 66, page 229, in the Office of the Judge of Probate of Jefferson County, Alabama, and as amended and recorded in Corporation Record 66, page 409, in the Office of the Judge of Probate of Jefferson County, Alabama, is hereby amended to read as follows:
>
> "(4) The total amount of the authorized capital stock of said corporation is $45,500 which shall be divided into 455 shares of common stock of the par value of $100.00 each."
>
> "Resolved Further that the President and Secretary shall prepare and file the certificate required by the Alabama Code to make said decrease effective."

8. That at the time of the redemption in partial liquidation, the said corporation had earnings or profits accumulated after December 31, 1932, of Three Hundred Fifty-four Thousand One Hundred Five and 98/100 Dollars ($354,105.98), within the meaning of Section 403 of Title 51 of the **Code of Alabama, 1940.**

9. That petitioners, filing a joint state income tax return for the calendar year 1956, correctly reflected thereon a net taxable income of zero (0) within the meaning of Section 382 and Section 377 of Title 51 of the **Code of Alabama, 1940,** as last amended, and the regulations promulgated thereunder.

10. That on September 17, 1957, the State Department of Revenue, through its agent L. A. Wessinger, assessed State income taxes in the amount of Five Thousand Seven Hundred Seventy-eight and 66/100 Dollars ($5,778.66) against petitioners, taxing the proceeds of said partial liquidation as a "sale of stock," claiming that the excess of the liquidating dividend over the basis of the shares owned by the petitioners, One Hundred Forty-three Thousand One Hundred and no/100 Dollars ($143,100.00), was a "profit from sale." The petitioners paid the Five Thousand Seven Hundred Seventy-eight and 66/100 Dollars ($5,778.66), together with interest thereon from April 15, 1957, on, to-wit, September 30, 1957.

11. That such income tax and interest was erroneously and mistakenly paid by petitioners since the money received by petitioners constituted "liquidating dividend" and not a "sale" within the meaning of Section 388 and Section 403 of the **Code of Alabama, 1940,** as last amended, and the regulations promulgated thereunder.

12. That in accordance with the provisions of Section 410 of Title 51 of the Code of Alabama, 1940, as last amended, and the regulations established in pursuance

thereof, the petitioners filed in duplicate their application for refund of such tax and interest, erroneously paid, with the Department of Revenue of the State of Alabama, on, to-wit, June 15, 1960, within three years of the date of payment thereof. A copy of said application, marked Exhibit "C", is attached hereto and made a part hereof as if fully set forth herein, and the facts stated therein are hereby incorporated and averred in this petition.

13. That more than three months have elapsed since the filing thereof, but Harry H. Haden, Commissioner of Revenue of the State of Alabama, has wrongfully failed to grant said refund, having failed to certify to the Comptroller of the State of Alabama that the sum of Five Thousand Seven Hundred Seventy-eight and 66/100 Dollars ($5,778.66) and interest thereon, or any other sum, is due to be refunded to your petitioners. Petitioners have no adequate remedy other than this proceeding in the nature of mandamus, and this proceeding is instituted within the time designated by Section 414 of Title 51 of the **Code of Alabama, 1940.** By such failure the petitioners have been deprived of their clear legal right to the refund of such sums.

14. Petitioners further show that such failure or refusal by the said Harry H. Haden as Commissioner of Revenue of the State of Alabama constitutes a failure on the part of said Harry H. Haden to perform a ministerial duty imposed upon him as Commissioner of Revenue of Alabama by Section 410 of Title 51 of the **Code of Alabama, 1940,** as last amended, and the regulations promulgated thereunder.

Wherefore, the Premises Considered, petitioners respectfully pray that the said Harry H. Haden be made party defendant to this petition and that process issue to him requiring him to plead, answer or demur to this petition within the time and in the manner required by law and

the rules of this Honorable Court; that Your Honor will issue an alternative writ of mandamus, directed to the said Harry H. Haden as Commissioner of Revenue of the State of Alabama, returnable to the Circuit Court of Montgomery County, Alabama, requiring the said Harry H. Haden, as such Commissioner of Revenue, forthwith to certify to the Comptroller of the State of Alabama that the sum of Five Thousand Seven Hundred Seventy-eight and 66/100 Dollars ($5,778.66), together with accrued interest thereon from April 15, 1957, is due to be refunded to your petitioners, or to appear at a time to be designated by Your Honor and show cause why he should not do so; that upon a hearing hereof Your Honor will issue a writ of mandamus Ordering and Commanding the said Harry H. Haden, as such Commissioner of Revenue, forthwith to certify to the Comptroller of the State of Alabama that the sum of Five Thousand Seven Hundred Seventy-eight and 66/100 Dollars ($5,778.66), together with accrued interest thereon from April 15, 1957, is due to be refunded to your petitioners, and that the costs of this proceeding be taxed against the defendant; and petitioners respectfully pray for any other and further relief; and for such other and further orders and judgments to which they may be entitled under the facts above alleged.

/s/ Spain, Gillon & Young,
805 First National Building,
Birmingham 3, Alabama,
Attorneys for Leo E. Bashinsky
and Cora Y. Bashinsky.

State of Alabama,
Jefferson County.

Before me, Joyce E. Spearman, a Notary Public in and for said County, in said State, personally appeared Leo E. Bashinsky and Cora Y. Bashinsky, who are the petitioners in the foregoing Petition and who are known to me, and

upon oath depose and say that they have knowledge of the facts averred in the foregoing Petition and that the facts therein averred are true and correct

/s/ Leo E. Bashinsky,
/s/ Cora Y. Bashinsky.

Sworn to and subscribed before me, this the 21 day of July, 1961.

/s/ Joyce E. Spearman,
Notary Public.

My Commission expires: 2/3/62.

Exhibit "A".

Minutes of the Regular Meeting
of the Board of Directors
Of
Magic City Food Products Co., Inc.

A regular meeting of the Board of Directors of Magic City Food Products Co., Inc., was held at 10:00 A. M. on December 21, 1955 at 1501 Lomb Blvd., in the City of Birmingham, Alabama.

The following directors, who are all of the members of the Board of

• • • • • • • •

Answer.

In the
Circuit Court for the Fifteenth Judicial
Circuit of Alabama.

Leo E. Bashinsky and Cora Y. Bashinsky,
Petitioners,
vs.
Harry H. Haden, as Commissioner of Revenue of the State of Alabama,
Defendant.

Comes the Defendant, Harry H. Haden, as Commisioner of Revenue of the State of Alabama, and for answer to the bill of complaint heretofore filed in this cause says as follows:

1. The allegations in paragraph 1 are admitted to be true.

2. The allegations in paragraph 2 are generally admitted to be true; however, the Defendant specifically denies any allegations therein which alleges or tends to allege that the corporation, Magic City Food Products, Inc., was dissolved.

3. For further answer to paragraph 2, the Defendant denies the allegation that the corporation was liquidated, or partially liquidated, but admits that the corporation was allowed to continue operation by the transaction, which transaction it is averred by the Defendant was a sale of the stock owned by the Petitioners to the other stockholders of the corporation, Magic City Food Products Co., Inc.

4. In further answer to paragraph 2, the Defendant avers that any allegation in the Minutes of the meetings

of the Board of Directors which meetings occurred on December 21, 1955, and January 19, 1956, that allege, or tend to allege, a liquidation, or partial liquidation, are denied as to their conclusiveness as to the motive of the transaction which occurred, and the Defendant affirmatively avers that such proceedings as set out in the Minutes can only state the intent of the parties and the facts alone must determine the true nature of the transaction.

5. For answer to paragraph 3, the Defendant admits the allegations which allude to the intent of the parties to the transaction, a sales transaction it is reiterated, and which alludes to that which was intended to be accomplished and which was accomplished; but the Defendant specifically denies that the transaction whereby the stock of the two shareholders, C. A. Case and Leo E. Bashinsky, was redeemed was a partial liquidation; the Defendant cannot accept such conclusions concerning facts that clearly indicate a sale.

6. The Defendant denies the allegation in paragraph 4 that the transaction was a partial liquidation; but admits the remaining allegations therein.

7. The Defendant admits the allegations in paragraph 5 but states affirmatively in reiteration of his previously stated position that the redemption of the stock occurred through a sales transaction, not through a liquidation or partial liquidation.

8. The Defendant admits the allegation in paragraph 6 but again emphasizes that the redemption was by purchase of the stock.

9. The Defendant admits the allegations in paragraph 7 in regard to the facts of the reduction of the capital stock of Magic City Food Products Co., Inc. but denies any implication that this reduction was a partial liquidation; it was the reorganization of a corporation for the purpose of continuing in business with no break in the

corporate life of the entity as evidenced by the Minutes alluded to in prior paragraphs.

10. The allegations in paragraph 8 are admitted to be true.

11. The Defendant denies each and every allegation in paragraph 9 and affirmatively avers that the amounts received in return for the sale of their stock in Magic City Food Products Co., Inc. was income in the year received and that the amount of tax due, $5,778.66, as established by L. A. Wessinger, an auditor of the State Department of Revenue, was correctly paid by the Petitioner and is properly owed by the Petitioner.

12. The Defendant affirms each and every allegation in paragraph 10 and concurs in the correctness of the acts of his agent, L. A. Wessinger.

13. The Defendant denies each and every allegation in paragraph 11.

14. The allegations in paragraph 12 are admitted to be true except insofar as the petition for refund, Exhibit C, which is made a part of paragraph 12 by reference, alleges that the income tax was incorrectly paid and should be refunded.

15. The allegations in paragraph 13 are admitted to be true except insofar that they allege that the Defendant, Harry H. Haden, "has wrongfully failed to grant said refund, having failed to certify to the Comptroller of the State of Alabama that the sum of Five Thousand, Seven Hundred Seventy-eight and 66/100 Dollars ($5,778.66) and interest thereon, or any other sum, is due to be refunded to your petitioners"; the foregoing allegation is specifically denied; and, of course, there is the possibility that other action is open to the Petitioners. Certainly they have had administrative interpretation; however, the Defendant does not wish to challenge the Petitioners' right

to bring this action even though the Defendant is convinced that his interpretation of the statute, as applied to the facts in this instance, is correct.

16. The Defendant denies the allegations in paragraph 14.

Wherefore Premises Considered, the Defendant, Harry H. Haden, as Commissioner of Revenue of the State of Alabama, prays that this Honorable Court will declare the tax as established by the Agent of the Department of Revenue to be the amount of tax due; to in so doing declare that the sum of money which gave rise to this controversy was in fact received by the Petitioners as the result of a sale of their capital stock in the Magic City Food Products Co., Inc., and not from a liquidation, or partial liquidation, of the said corporation, further, the Defendant prays that the Court affirm his action in denying petition of refund of the Petitioners and in all things touching on this transaction, affirm the action of the Defendant, as Commissioner of Revenue of the State of Alabama; and for such other affirmation and averments as the Court may deem the Defendant is entitled.

/s/ MacDonald Gallion,
As Attorney General of Alabama,

/s/ Guy Sparks,
As Executive Assistant of the Legal Division, Department of Revenue of the State of Alabama, and Special Assistant Attorney General of Alabama,

/s/ Herbert I. Burson, Jr.,
As Assistant Counsel, Department of Revenue of the State of Alabama, and Assistant Attorney General of Alabama.

State of Alabama,
Montgomery.

I, Herbert I. Burson, Jr., of Counsel, and one of the solicitors for the Defendant, hereby certify that I have served a copy of the above and foregoing answer upon Spain, Gillon & Young, 805 First National Building, Birmingham 3, Alabama, attorneys for the Petitioners, by mailing a copy to them at said address by regular United States Mail, postage prepaid, on the 9th day of August, 1961.

/s/ Herbert I. Burson, Jr.,
Of Counsel.

Filed in office August 14, 1961.

John R. Matthews, Clerk.

Opinion and Decree.

In the Circuit Court for the Fifteenth
Judicial Circuit of Alabama.

Leo E. Bashinsky and Cora Y. Bashinsky,
Petitioners,
vs.
Harry H. Haden, as Commissioner of Revenue of the State of Alabama,
Defendant,
By Amendment, Guy Sparks, as Commissioner of Revenue of the State of Alabama,
Party Defendant,
Harry H. Haden having been stricken.

This matter is submitted to the Court for final decree on the petition in the nature of mandamus by Leo E.

Bashinsky and Cora Y. Bashinsky wherein they seek the nullification of the final assessment of the State Department of Revenue for income tax for the calendar year 1956, which assessment was entered on September 17, 1957, in the amount of $5,778.66. This sum was paid on September 30, 1957. The Petitioners likewise seek the refund of this amount, together with interest. The petition for mandamus was timely filed and in the manner required by law, together with a bond for cost. The Petitioners having paid the tax were relieved from filing supersedeas bond. The Defendant filed his Answer on August 9, 1961; and on October 17, 1961, the Petitioners filed a Motion to Strike certain portions of the Answer. The case was heard in open Court, the Petitioners and their counsel being present and the Defendant being present by one of his counsel of record. Oral testimony was taken and documentary evidence introduced. Counsel argued the case orally and submitted briefs whereupon the case was submitted for final decree on the merits based upon the petition as amended, the Answer, the Motion to Strike, the oral and documentary evidence introduced at the trial; the oral arguments and briefs of counsel; and the Court finds:

Findings.

Having reserved its ruling on the Motion to Strike filed by the Petitioner, that that portion of the Defendant's Answer in paragraph 15 thereof quoted in the Motion to Strike (paragraph A) to which the Petitioner assigns nine (9) grounds of objection, should be stricken; likewise that portion of the Defendant's Answer in paragraph 4 thereof, quoted in the Motion to Strike (paragraph B) to which the Petitioner assigns three (3) grounds of objection; likewise that portion of the Defendant's Answer in paragraph 5 thereof, quoted in the Motion to Strike (paragraph C) to which the Petitioner assigns twelve (12)

grounds of objection; likewise that portion of the Defendant's Answer in paragraph 7 thereof, quoted in the Motion to Strike (paragraph D) to which the Petitioner assigns twelve (12) grounds of objection; likewise that portion of the Defendant's Answer in paragraph 11 thereof, which is identified in paragraph E of the Motion to Strike to which the Petitioner assigns twenty-four (24) grounds of objection; likewise that portion of the Defendant's Answer in paragraph 3 thereof quoted in the Motion to Strike (paragraph F) to which the Petitioner assigns twenty-two (22) grounds of objection. Paragraphs G and H of the Motion to Strike are so general in their application that it is impossible for the Court to tell to what specific portion of the Answer the objections are raised. Therefore, that portion of the Motion to Strike contained in those said paragraphs should be denied. After the removal of the objectional portions of the Defendant's Answer, there remains sufficient denial in the Answer to the Petition to bring the matter at issue on the merits. The principal contention of the Petitioner is that the income which gave rise to the final assessment for income taxes for 1956 by the Department of Revenue was derived from liquidating dividends wherein the stock of the Appellant in Magic City Food Products Company, Inc. was liquidated and that therefore the dividends were exempt from Alabama income tax under the provisions of Section 388, Title 51, Code of Alabama 1940. The principal contention of the Defendant is that there was, in fact, no liquidation of the corporation and therefore no liquidating dividends and that the transaction wherein the Petitioner withdrew from the Magic City Food Products Company, Inc., was a sale of stock and therefore taxable to the Petitioner as ordinary income. The Court is of the opinion that the transaction was in fact a sale of stock.

The Register will enroll the following decree:

Decree.

1. Paragraphs A, B, C, D, E, and F, of the Petitioner's Motion to Strike are herewith granted for the reasons cited therein and objectional portions are stricken from the Defendant's Answer; paragraphs G and H of the Petitioner's Motion to Strike are denied for that they are too general in terminology and do not sufficiently identify those portions of the Answer to which the grounds of objection should apply.

2. The additional assessment made and entered by the Department of Revenue for the State of Alabama on September 17, 1957 in the amount of $5,778.66 against Leo E. Bashinsky and Cora Y. Bashinsky under the provisions of the Alabama Income Tax Law, Section 373 et seq., Title 51, Code of Alabama 1940, is valid and is herewith ratified in its entirety.

3. The costs of court are taxed against the Petitioner for which execution may issue.

Done this 22 day of March, 1962.

/s/ Walter B. Jones, Presiding Judge.

Filed in office March 22, 1962.

John R. Matthews, Clerk.

Security for Costs of Appeal to Supreme Court.

Fifteenth Judicial Circuit of Alabama.

The State of Alabama,
Jefferson County,

Leo E. Bashinsky and Cora Y. Bashinsky.
Complainants,
vs.
Guy Sparks as Commissioner of Revenue of the State of Alabama,
Respondent.

We, the undersigned, jointly and severally, hereby acknowledge ourselves security for all costs of appeal to the Supreme Court of Alabama, from the Decree rendered in the above entitled Cause on the 22nd day of March, 1962; and hereby agree to pay all such costs. And for the payment of this bond, we hereby waive our right of exemption under the Constitution and Laws of the State of Alabama.

Witness our hands and seals, this the 4th day of April, 1962.

/s/ Leo E. Bashinsky,
/s/ Cora Y. Bashinsky,
New Amsterdam Casualty Co.
By: /s/ Mark A. Myatt,
Attorney in fact.
(Seal)

Taken and approved, this 12 day of April, 1962.

John R. Matthews, Clerk.

Filed in office April 12, 1962.

John R. Matthews, Clerk.

The State of Alabama
City and County of Montgomery

I, Richard W. Neal, Deputy Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages numbered from one to five, thirteen to fifteen and twenty-two to twenty-four contain a full, true and correct copy of said pages of the original record of the Supreme Court of Alabama in the cause of Leo E. Bashinsky and Cora Y. Bashinsky, appellants v. Guy Sparks, as Commissioner of Revenue of Alabama, appellee, as the same appears and remains of record and on file in this office.

Witness, Richard W. Neal, Deputy Clerk of the Supreme Court of Alabama, this the 25th day of October, 1965.

Richard W. Neal,
Deputy Clerk of the Supreme Court of Alabama.

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